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Supreme Court of the United States

OCTOBER TERM, 1948

No. 327

EMPRESA SIDERURGICA, S. A., A CORPORATION OF COLOMBIA, SOUTH AMERICA, ET AL., APPELLANTS,

vs.

COUNTY OF MERCED, A MUNICIPAL CORPORATION, J. EMMETT McNAMARA, ASSESSOR OF THE COUNTY OF MERCED, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

FILED SEPTEMBER 29, 1948.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF MERCED

No. 15928

EMPRESA SIDERURGICA, S. A., a corporation or Colombia, South America, and Vanderburg & Co., Inc., a California corporation, Plaintiffs,

vs.

COUNTY OF MERCED, a municipal corporation, J. EMMETT MCNAMARA, Assessor of the County of Merced, First John Doe, Second John Doe, Third John Doe, Fourth John Doe, Fifth to Twentieth Does, Defendants

COMPLAINT—Filed February 11, 1946

Now comes Plaintiffs, Empresa Siderurgica, S. A., and Vanderburgh & Co., Inc., and complain of Defendants above named, and for cause of action allege:

I

That Plaintiff, Empresa Siderurgica, S. A., is a corporation duly organized and existing under and by virtue of the laws of Colombia, S. A. and having its principal place of business in Medellin, Colombia, South America. That Plaintiff, Vanderburgh & Co., Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of California and having its principal place of [fol. 2] business in the City and County of San Francisco, State of California.

II

That Defendant, County of Merced, is a municipal corporation duly organized and existing under and by virtue of the laws of the State of California. That Defendant, J. Emmett McNamara, is and at all times mentioned herein has been the duly elected, qualified and acting Tax Assessor of the County of Merced, State of California.

III

That the Defendants, First John Doe, Second John Doe, Third John Doe, Fourth John Doe, and Fifth to Twentieth

Does are the fictitious names of Defendants whose true names are to these Plaintiffs unknown and Plaintiffs ask that when such true names are discovered that this Complaint be amended by inserting such true names in the place instead of such fictitious names.

IV

That the Plaintiff, Empresa Siderurgica, S. A., is a corporation engaged in the business of manufacturing certain commodities in Colombia, South America; that all of Plaintiff's business is conducted in South America and that it is not qualified to do business in California and does no business in this state, nor does it have any office or other place of business located in the State of California.

[fol. 3]

V

That the Plaintiff, Vanderburgh & Co., Inc., is a corporation duly incorporated under the laws of the State of California and engaged in the business of exporting, importing and acting as forwarding agents.

VI

That on or about November 11, 1944, Plaintiff, Empresa Siderurgica, S. A., entered into a contract with Kaiser Engineers for the purchase of buildings, material and equipment of the Yosemite Portland Cement Plant, located near the City of Merced, in the County of Merced, State of California. That under the terms of said contract, title to said cement plant and equipment was not to pass to Empresa Siderurgica, S. A. until two conditions had been fulfilled, to-wit: (1) the issuance of an export permit for the plant and equipment to Colombia, S. A. by the Foreign Economic Administration; and (2) the establishment of a letter of credit to cover the entire purchase price with the main office of the Bank of America, National Trust & Savings Association, in San Francisco. The export license, as aforesaid, was issued by the Foreign Economic Administration on the 15th day of December, 1944. The letter of credit was established with the Bank of America on January 3, 1945. Simultaneous with the fulfillment of both conditions, as aforesaid, to-wit, on January 3, 1945, title to the buildings, materials and equipment of the Yosemite Portland Cement

[fol. 4] Plant passed to Plaintiff, Empresa Siderurgica, S. A., and the possession of the said plant and equipment was taken by the forwarding agent, Vanderburgh & Co., Inc., Plaintiff herein.

VII

That prior to January 3, 1945, and in contemplation of the said contract; Plaintiff, Vanderburgh & Co., Inc., forwarding agents for Empresa Siderurgica, S. A., contracted with Bigge Drayage Company, a common carrier of the City of Oakland, County of Alameda, State of California, to dismantle, package and prepare for shipment and remove the said plant and equipment from its location at Merced, California to the railroad siding and load on cars, as cars and shipping space became available, for shipment to Colombia, South America. That immediately upon passage of title to the plant and equipment to Empresa Siderurgica, S. A., and the taking of possession thereof by Vanderburgh & Co., Inc. as forwarding agents, Bigge Drayage Company, pursuant to its contract with Vanderburgh & Co., Inc., undertook and entered upon the work of dismantling said cement plant and equipment and actual shipments of said plant and equipment out of said County of Merced in transit to Colombia, South America, began in February, 1945. That the work of dismantling and shipping said plant and equipment has continued uninterruptedly since January, 1945, and has progressed as rapidly as transportation facilities [fol. 5] and war conditions permitted. That the sale of said plant and equipment and its purchase by Empresa Siderurgica, S. A. was for the purpose of and was conditioned upon the immediate export and shipment of said plant and equipment to Colombia, South America, as evidenced by the terms of the contract of sale and the conduct of the parties pursuant thereto. None of said plant and equipment was held or detained in the County of Merced for any purpose of the Plaintiffs' or for any purpose other than to await necessary dismantling operations and shipping and transportation facilities. That on January 18, 1946, the entire plant had left the County of Merced, and on January 29, 1946, the whole of the plant had been completely shipped out of the United States.

VIII

That on or about March 5, 1945, the Defendant J. Emmett McNamara, acting as County Assessor for the Defendant, County of Merced, did levy on and address an assessment on "Personal Property located on S½ of Sec. 12-7-13;" that this said assessment was directed and addressed to "Unknown Owner" of the aforesaid Yosemite Portland Cement Plant; that said levy and assessment for personal property taxes was in the amount of Nine Thousand and Ninety Dollars ($9,090.00).

IX

That thereafter, Plaintiffs notified Defendant Assessor of the facts as hereinabove set forth, and further notified said Defendant that the whole of said personal property [fol. 6] purportedly assessed was an export, and further was property in the course of foreign commerce; but notwithstanding such facts said Defendant did demand payment of such personal property tax. That thereafter, Defendant J. Emmett McNamara did appear before the Board of Supervisors of the County of Merced and did move to correct the record of the tax roll on such personal property assessment to Seven Thousand Nine Hundred and Ninety Nine Dollars and Twenty Cents ($7,999.20); that such correction was ordered and allowed by the said Board of Supervisors and the amount of personal property tax was corrected on the tax roll of the said County to the sum of $7,999.20, and said Defendant did demand payment of such corrected personal property tax.

X

Pursuant to said demand, Plaintiffs paid said tax involuntarily and under protest, under the provisions of Section 5136 of the Revenue and Taxation Code of the State of California, on or about the 31st day of August, 1945; and concurrently with such payment, Plaintiffs enclosed and delivered to Defendant, J. Emmett McNamara, as Assessor of the Defendant County of Merced, a protest, a true and correct copy of which is attached hereto and marked Exhibit "A".

XI

That the said tax was and is an unlawful tax on the personal property of Plaintiffs and was illegally levied and

[fol. 7] placed upon the tax roll of the said County of Merced under color of law therefor. That the imposition of the said personal property tax is an unlawful tax on the following grounds:

(1) That the property assessed by this said personal property tax and for which payment under protest was made as aforesaid, was at the time of the assessment of this tax and ever since has been an export and as such was and is exempt from taxation by the State of California and/or the County of Merced under the provisions of Article I, Section 10, Clause 2 of the Constitution of the United States, which prohibits taxation of exports by the states, and the said property was not properly subject to taxation by the State of California and/or the County of Merced under Article XIII, Section 1 of the Constitution of the State of California and Section 202 of the Revenue and Taxation Code of the State of California.

(2) That the property assessed by this personal property tax and for which payment under protest was made, as aforesaid, was at the time of assessment of [fol. 8] this tax in the hands of a common carrier and was and is property or commodities entered and moving in the course of transportation in foreign commerce, and as such, was and is exempt from taxation by the State of California and/or the County of Merced under the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States and under Article XIII, Section 1 of the Constitution of the State of California, and Section 202 of the Revenue and Taxation Code of the State of California; and that such taxation constituted and does constitute an interference with goods entered and moving in the course of foreign commerce.

(3) That this assessment constitutes a deprivation and taking away of the property without due process of law contrary to the provisions of Article XIV, Section 1, of the Constitution of the United States, since said assessment was levied on property not within or subject to the jurisdiction of the State of California and/or the County of Merced for taxing purposes under Section 1 of the Article XIII of the Constitution of the

State of California and Section 202 of the Revenue and [fol. 9] Taxation Code of the State of California.

(4) That the property assessed was owned by a corporation not a resident of the State of California nor authorized to do business in the State of California, nor having any place of business in the State of California, and since certain of the property assessed was at the time of the said assessment outside of the County of Merced and/or the State of California, such assessment was levied on property, the situs of which was not within the State of California.

XII

That the Defendants have failed and refused, and now fail and refuse to pay to Plaintiffs the amount of said tax illegally collected or any part thereof.

XIII

This action was brought pursuant to the provisions of Section 5136 to 5143, inclusive, of the Revenue and Taxation Code of the State of California.

Wherefore, Plaintiffs pray Judgment against Defendants in the sum of Seven Thousand Nine Hundred and Ninety Nine Dollars and Twenty Cents ($7,999.20), together with interest at the legal rate per annum from the date of payment, and for Plaintiffs' costs of suit herein incurred, and for such other and further relief as to the Court may seem [fol. 10] just and proper in the premises.

Ward, Kellogg & Simmons, by (S.) Scott D. Kellogg,
Attorneys for Plaintiff.

[fol. 11] *Duly sworn to by Scott D. Kellogg. Jurat omitted in printing.*

[fol. 12] EXHIBIT "A" TO COMPLAINT

Protest of Personal Property Taxes Assessed Against Machinery and Equipment Formerly Comprising the Cement Manufacturing Plant of Yosemite Portland Cement Co.

To the County of Merced, State of California, and J. Emmett McNamara, County Assessor:

I

Vanderburgh & Co., Inc., a California corporation, forwarding agent, engaged in the business of export and import trade, on behalf of itself and on behalf of Empresa Siderurgica, S. A., a corporation duly organized and doing business under and by virtue of the laws of Colombia, South America, herewith pays under protest as provided for and in accordance with the Revenue and Taxation Code Div. 1, Pt. 9, Ch. 5, Art. 2, Sections 5136 et seq., that certain personal property tax levied by J. Emmett McNamara, County Assessor in and for Merced County, State of California, upon the machinery, equipment, and other miscellaneous property formerly comprising the cement manufacturing plant of Yosemite Portland Cement Co., which formerly had a situs as being located on the S½ of S¼ of Section 12-7-3 in the County of Merced, State of California; such tax levy being evidenced by a tax bill and notice dated March 5, 1945, in the amount of $9,090.00 which was subsequently duly reduced to $7,999.20. A check is attached hereto in the sum of $7,999.20 in payment of said tax under protest.

[fol. 13] II

Said Vanderburgh & Co., Inc., acting on behalf of itself and said Empresa Siderurgica, S. A., represents and claims:

(a) That the whole of said assessment is void.

(b) That the grounds on which the claim is founded are as follows:

(1) That on January 3, 1945, Empresa Siderurgica, S. A., took title to the property assessed under the aforesaid tax assessment under a contract whereby Empresa Siderurgica agreed to purchase said property and take title thereto only on the happening of certain conditions, one of which said conditions was the issuance of an export permit by the Foreign Economic Administration of the United States, so that said property might be exported immediatey after the taking of title by Empresa Siderurgica to Colombia, South America, that on January 3, 1945, and only after said

export permit was actually issued by the Foreign Economic Administration, for all said personal property, possession of said property was taken by Vanderburgh & Co. Inc., forwarding agent for Empresa Siderurgica, S. A. That said forwarding agent employed Bigge Drayage Company, a common carrier, upon the date title passed to Empresa Siderurgica, [fol. 14] S. A., and possession taken by said forwarding agent, to immediately proceed to undertake and begin the work of dismantling said plant of equipment for shipment and the crating and shipment of the said plant and equipment; that by the contract of purchase of the said property by Empresa Siderurgica, S. A., and by the subsequent conduct of its forwarding agent, Vanderburgh & Co., Inc., and the common carrier, Bigge Drayage Company, all of the personal property herein taxed, immediately assumed the status of an export; and that the property assessed by this personal property tax, and for which payment under protest is made herewith, was at the time of the assessment of this tax, and ever since has been, an export and as such was exempt from taxation by the State of California and/or the County of Merced, under the provisions of the Constitution of the United States, Article I, Section 10, Clause 2, which prohibits taxation of exports by the several states of the United States, and the said property was not properly subject to taxation by the State of California and/or the County of Merced, under Article XIII, Section 1, Constitution of the State of California and Section 202 of the Revenue and Taxa- [fol. 15] tion Code of the State of California.

(2) That on January 3, 1945, when title to the assessed property was taken by Empresa Siderurgica, S. A., the possession of said personal property passed immediately into the hands of Vanderburgh & Co., Inc., the forwarding agent for Empresa Siderurgica, S. A., and the property itself was taken over by Bigge Drayage Company, a common carrier, who forth with and immediately entered upon the process of dismantling of said personal property, of crating said property for shipment and shipped said property to Colombia, S. A.; that as of March 5, 1945, the date of the assessment herein, as hereinabove set forth, various carloads of

said property had already been shipped by Vanderburgh & Co., Inc. out of the County of Merced and out of the State of California, enroute to Colombia, S. A., and the work of dismantling and shipping of the said plant was going on and has gone on uninterrupted ever since said date and shipments of the said property have continued and are continuing to Colombia, S. A.; that the property assessed in this personal property tax, and for which payment under protest is made herewith, was at the time of the assessment of this tax, and ever [fol. 16] since has been, property or commodity entered and moving in the course of transportation in foreign commerce, and as such was and is exempt from taxation by the State of California and/or the County of Merced. Under the provisions of the Constitution of the United States, Article I, Section 8, Clause 3 and under Article XIII, Section 1, of the Constitution of the State of California and Section 202 of the Revenue and Taxation Code of the State of California, such taxation by the County of Merced constituted and does constitute an interference with goods entered and moving in the course of foreign commerce.

(3) That because of threats of officials of the County of Merced to interfere with and interrupt the shipping of said personal property from the County of Merced to Colombia, S. A., it has become necessary to pay said taxes under this protest; that the State of California has no jurisdiction over said property for taxing purposes and that this assessment constitutes a deprivation and taking away of the property of Vanderburgh & Co., Inc., and/or Empresa Siderurgica, S. A., without due process of law, contrary to the provisions of the Constitution of the United States, Article XIV, Section [fol. 17] 1, because the assessment is levied on property not within or subject to the jurisdiction of the State of California and/or the County of Merced, for taxing purposes, under Article XIII, Section 1, of the Constitution of the State of California and Section 202 of the Revenue and Taxation Code of the State of California.

(4) That the property assessed is owned by a corporation not a resident of the State of California, nor authorized to do business in the State of California, nor

having any place of business in the State of California; and the assessment was levied on property, the situs of which was not within the State of California; that there is no authority under the California Constitution or California Statutes for the levying of a tax on personal property having a situs outside of the State and owned by persons or corporations not a resident of the State or not present within the State for any purpose.

(5) That the assessment referred to above and for which payment under protest is made herewith is illegal, invalid and void under the Constitution and laws of the State of California and the Constitution of the United States, as hereinabove set out; and that if the [fol. 18] laws of the State of California purport to authorize the said assessment, said laws are invalid for the reason that they are in contravention and in conflict with the Constitution of the United States.

As and for a second and further protest of said assessment and payment under protest, said Vanderburgh & Co., Inc., on behalf of itself and said Empresa Siderurgica, S. A., alleges:

I

That it hereby incorporates herein paragraph I hereinabove set forth, the same and to all intents and purposes as if said paragraph was herein set forth in full verbatim.

II

Said Vanderburgh & Co., Inc., acting on behalf of itself and said Empresa Siderurgica, S. A., represents and claims:

(a) That that portion or part of said assessment allocated to the machinery, equipment and/or other miscellaneous property hereinabove described which was crated and loaded on freight cars, such property being within the County of Merced, State of California, is void.

(b) That the grounds on which the claim is founded are set forth in full in paragraph II (b) et seq. hereinabove and are incorporated herein by reference the same and to all intents and purposes as if said para-

[fol. 19] graph et seq. were herein set forth in full verbatim.

As and for a third and further protest of said assessment and payment under protest, said Vanderburgh & Co., Inc., on behalf of itself and said Empresa Siderurgica, S. A., alleges:

I

That it hereby incorporates herein paragraph I hereinabove set forth, the same and to all intents and purposes as if said paragraph was herein set forth in full verbatim.

II

Said Vanderburgh & Co., Inc., acting on behalf of itself and said Empresa Siderurgica, S. A., represents and claims:

(a) That that portion or part of said assessment is void which is allocated to the machinery, equipment and/or other miscellaneous property hereinabove described which was crated and ready to be loaded on freight cars for shipment to Colombia, South America, although not so loaded on March 5, 1945.

(b) That the grounds on which the claim is founded are set forth in full in paragraph II (b) et seq. hereinabove and are incorporated herein by reference the same and to all intents and purposes as if said paragraph et seq. were herein set forth in full verbatim.

As and for a fourth and further protest of said assess-
[fol. 20] ment and payment under protest, said Vanderburgh & Co., Inc., on behalf of itself and said Empresa Siderurgica, S. A., alleges:

I

That it hereby incorporates herein paragraph I hereinabove set forth, the same and to all intents and purposes as if said paragraph was herein set forth in full verbatim.

II

Said Vanderburgh & Co., Inc., acting on behalf of itself and said Empresa Siderurgica, S. A., represents and claims:

(a) That that portion or part of said assessment is void which is allocated to the machinery, equipment and/or other miscellaneous property hereinabove described which had been dismantled preparatory for crating, loading and shipping, although not so crated, loaded or shipped on March 5, 1945.

(b) That the grounds on which the claim is founded are set forth in full in paragraph II (b) et seq. hereinabove and are incorporated herein by reference the same and to all intents and purposes as if said paragraph et seq. were herein set forth in full verbatim.

As and for a fifth and further protest of said assessment and payment under protest, said Vanderburgh & Co., Inc., on behalf of itself and said Empresa Siderurgica, S. A., [fol. 21] alleges:

I

That it hereby incorporates herein paragraph I hereinabove set forth, the same and to all intents and purposes as if said paragraph was herein set forth in full verbatim.

II

Said Vanderburgh & Co., Inc., acting on behalf of itself and said Empresa Siderurgica, S. A., represents and claims:

(a) That that portion or part of said assessment is void which is allocated to the machinery, equipment and/or other miscellaneous property hereinabove described which had not been on March 5, 1945, dismantled, crated, loaded or shipped, but was covered by the contract between Empresa Siderurgica, S. A., and Henry J. Kaiser Co. as well as the contract between Vanderburgh & Co., Inc., and Bigge Drayage Co., both of which, by their terms, required that such property be dismantled, crated, loaded and shipped to Colombia, South America.

(b) That the grounds on which the claim is founded are set forth in full in paragraph II(b) et seq. hereinabove and are incorporated herein by reference the same and to all intents and purposes as if said paragraph et seq. were herein set forth in full verbatim.

[fol. 22] Dated this 31st day of August, 1945, in the City of Merced, County of Merced, State of California.

Respectfully submitted, Vanderburgh & Co., Inc., by (S.) Scott D. Kellogg, Authorized Agent. Empresa Siderurgica, S. A., by Vanderburgh & Co., Inc., by (S.) Scott D. Kellogg, Authorized Agent.

Ward, Kellogg & Simmons, by (S.) Scott D. Kellogg, Attorneys for Vanderburgh & Co., Inc. and Empresa Siderurgica, S. A., 861-864 Mills Tower, San Francisco 4, California.

[fol. 23] [File endorsement omitted]

IN SUPERIOR COURT OF MERCED COUNTY

[Title omitted]

JOINT ANSWER—Filed July 5, 1946

Come now the defendants, County of Merced and J. Emmett McNamara, and for their joint answer to the complaint herein:

I

Admit the allegations contained in paragraphs numbered I, II, III, IV, V, VIII, X and XIII thereof.

II

Admit that part of paragraph numbered VI thereof which alleges the existence of a contract dated November 11, 1944 between plaintiff, Empresa Siderurgica, S. A. and Henry J. Kaiser Company, a copy of which is attached as [fol. 24] exhibit "1" to a stipulation filed herein; the existence of export license dated December 15, 1944, issued by the Foreign Economic Administration, a copy of which is attached to said stipulation as exhibit "5"; and the existence of a letter of credit dated January 3, 1945, a copy of which is attached to said stipulation as exhibit "6."

Deny each and every allegation, matter and thing contained in paragraph numbered VI thereof, except as the same is in this paragraph expressly admitted, qualified or explained.

III

Admit that part of paragraph numbered VII thereof which alleges the existence of a contract between Vanderburgh & Co., Inc., and Bigge Drayage Co., dated December 2, 1944, a copy of which is attached to said stipulation as exhibit "2"; that on January 18, 1946, the entire plant had left the County of Merced; and that on January 29, 1946, the whole of said plant had been completely shipped out of the United States.

Allege that subsequent to the 3rd day of January, 1945, Bigge Drayage Co., commenced the work of dismantling said cement plant and equipment and shipments thereof by rail commenced in March, 1945, from the plant site in Merced County, California, to the port of vessel shipment; and that Bigge Drayage Company was and is a common carrier by motor vehicle.

[fol. 25] Deny each and every allegation, matter and thing contained in paragraph numbered VII thereof, except as the same is in this paragraph expressly admitted, qualified, or explained.

IV

Admit that part of paragraph numbered IX thereof which alleges that plaintiffs claimed to defendant J. Emmett McNamara that said personal property was an export and in the course of foreign commerce; that said defendant did demand payment of such personal property tax; that said defendant moved to correct the record of the tax roll on such personal property assessment to $7999.20, which correction was ordered and allowed by the Board of Supervisors of Merced County and said defendant demanded payment of such personal property tax as corrected.

Deny each and every allegation, matter and thing contained in paragraph numbered IX thereof, except as the same is in this paragraph expressly admitted, qualified or explained.

V

Admit that part of paragraph XI thereof which alleges that the property assessed was owned by a corporation not a resident of the State of California nor authorized to do business in the State of California, nor having any place of business in the State of California.

Deny each and every allegation, matter and thing con-

[fol. 26] tained in paragraph numbered XI thereof, except as the same is in this paragraph expressly admitted, qualified or explained.

VI

Admit that part of paragraph numbered XII thereof which alleges that defendants have refused and now refuse to pay to plaintiffs the amount of said tax.

Deny each and every allegation, matter and thing contained in paragraph numbered XII thereof, except as the same is in this paragraph expressly admitted, qualified or explained.

VII

Allege that at the time the assessment was levied against said personal property it was part of the general mass of property in the State within the County of Merced, State of California; that for a long time prior thereto, at that time and thereafter said property had received the protection of the laws of the State of California and for purposes of taxation such property at the time of said assessment had its situs in California, and in Merced County therein, and was not in interstate or foreign commerce and did not constitute an export.

Wherefore, defendants pray that judgment be entered dismissing the complaint, granting to defendants their costs and disbursements herein and for such other and further relief as to the Court may seem just and equitable.

[fol. 27] (S.) Claude H. Adams, District Attorney of Merced County. (S.) William R. Elam, Deputy District Attorney of Merced County, Attorneys for Defendants.

[fol. 28] [File endorsement omitted]

IN SUPERIOR COURT OF MERCED COUNTY

[Title omitted]

REQUEST FOR ASSIGNMENT OF JUDGE—Filed August 21, 1946

To the Chairman of the Judicial Council of the State of California:

Whereas, the above entitled action involves the question of the right of the County of Merced to tax certain personal property and the question of the right of the plaintiff to recover such taxes paid under protest, and

Whereas, it is stipulated and agreed by and between the [fol. 29] parties to said action that jury trial in said action be waived, and

Whereas, it is stipulated and agreed by and between the parties to said action that any one of the hereinafter named judges is a disinterested judge from a neutral county;

Now, therefore, the Superior Court of the State of California, in and for the County of Merced, respectfully requests the Judicial Council of the State of California to assign one of the following named judges to hear said cause and all proceedings in connection therewith:

Honorable Peter J. Shields of Sacramento County;
Honorable A. F. Bray of Contra Costa County;
Honorable Andrew R. Schottky of Mariposa County.

Dated this 14th day of August, 1946.

H. S. Shaffer, Judge of the Superior Court, Presiding.

[fol. 30] [File endorsement omitted]

IN SUPERIOR COURT OF MERCED COUNTY

[Title omitted]

STIPULATION FOR SETTING CASE FOR TRIAL—Filed October 17, 1946

Whereas, the above entitled action involves the question of the right of the County of Merced to tax certain personal property and the question of the right of the plaintiff to recover such taxes paid under protest, and

Whereas, it has been stipulated that a jury trial in said action be waived, and

Whereas, the issues raised by the complaint and the answer thereto have been joined and the matter is now ready for trial.

Now, therefore, it is hereby stipulated and agreed by [fol. 31] and between the attorneys for the parties to said

action that the trial of the above entitled action be set by the clerk of said court for November 8, 1946, at 10 o'clock A.M.

Ward, Kellogg & Simmons, By Betsy FitzGerald Rahn, Attorneys for plaintiff. Claude H. Adams, District Attorney of Merced County, By Claude H. Adams, Attorney for defendants.

[fol. 32] IN SUPERIOR COURT OF MERCED COUNTY

[Title omitted]

MINUTE ENTRY—Filed November 8, 1946

Hearing on the above entitled matter coming on regularly at this time, Betsy FitzGerald Rahn and S. D. Kellogg, of counsel for plaintiffs, and Claude H. Adams and A. R. Scanlon, of counsel for defendants, appear in court.

Counsel for plaintiffs and defendants present authorities and argument, and the matter is submitted to court on briefs 10-10 and 5.

[fol. 33] [File endorsement omitted]

IN SUPERIOR COURT OF MERCED COUNTY

[Title omitted]

STIPULATION AND AGREED STATEMENT OF FACTS—Filed July 5, 1946

It is hereby stipulated by and between Claude H. Adams, District Attorney of Merced County, attorney for Defendants in the above entitled action, and Ward, Kellogg & Simmons, attorneys for Plaintiffs in the above entitled action, that the above entitled case may be submitted to the Court upon an agreed Statement of Facts. It is further stipulated that all of the necessary and indispensable parties to this action are before the Court, but if the Court should determine that other parties should be served and brought before the jurisdiction — this Court, that the aforesaid attorneys stipulate and agree to accept service on behalf of said

[fol. 34] parties or cause service to be made, in which event the pleadings herein shall be made to conform to include such additional parties. In case additional parties are brought into the case and they or their attorneys stipulate and agree to the Agreed Statement of Facts, the case shall proceed; but in the event an agreement cannot be reached with said additional parties, then subject to the discretion of the Court, testimony shall be heard as to the controverted points only. It is further stipulated by the respective counsel for the parties that the following facts shall be submitted to the Court as the Agreed Statement of Facts in the said action, to-wit:

Prior to November 11, 1944, negotiations were entered into between Empresa Siderurgica, S.A. of Medellin, Colombia, South America, a corporation duly organized and existing under the laws of Colombia, South America, and having its principal place of business at Medellin, Colombia, South America, and Henry J. Kaiser Company, a corporation, duly organized and existing under the laws of the State of Nevada and having its principal place of business at 1522 Latham Square Building in the City of Oakland, County of Alameda, State of California, for the purchase of the Yosemite Portland Cement Plant, its machinery and equipment, located near the City of Merced in the County of Merced, State of California.

Thereafter, on November 11, 1944, Henry J. Kaiser Com-[fol. 35] pany entered into a written contract for the sale to Empresa Siderurgica, S. A. of that certain property known as Yosemite Portland Cement Plant, located in the County of Merced, State of California, a copy of which contract is attached hereto, marked Exhibit "1" and incorporated herein by reference.

On December 2, 1944, Vanderburgh & Co., Inc., an export-import corporation, was designated as forwarding agent in the place of Frank P. Dow, Inc., and said Vanderburgh & Co., Inc., a corporation duly organized and existing under the laws of the State of California, having its principal place of business at 220 Montgomery Street in the City and County of San Francisco, State of California, entered into a contract with Bigge Drayage Co., duly authorized to conduct, among other things, a storage and warehouse business and a general trucking, hauling, transferring and express

business, and a common carrier by motor vehicle duly licensed as such common carrier by the Interstate Commerce Commission to engage in interstate and foreign commerce, to dismantle the said cement plant, disassemble the equipment, package the same for shipment, and deliver said cement plant for shipment to Medellin, Colombia, S.A. That said cement plant was delivered by Bigge Drayage Co. to the Atchison, Topeka and Santa Fe Railway Co. at the plant site for transportation by rail to the point of embarkation; that all of the plant was shipped from the point of embarkation [fol. 36] by water carrier to Colombia, South America. Attached hereto and incorporated by reference are the following: Exhibit "2", copy of contract between Vanderburgh & Co., Inc. and Bigge Drayage Co.; Exhibit "3", Photostatic copy of certificate of convenience and necessity issued by Interstate Commerce Commission to Bigge Drayage Co.; and, Exhibit "4", copy of Articles of Incorporation and Amendment, Bigge Drayage Co.

For the purposes of this statement of facts and to denote the various companies and contracts, we refer to the Yosemite Portland Cement Plant as "cement plant"; Henry J. Kaiser Company as "Kaiser Company"; Empresa Siderurgica, S.A. as "Siderurgica"; Vanderburgh & Co., Inc. as "Vanderburgh"; Bigge Drayage Co. as "Bigge"; the contracts between Henry J. Kaiser Company and Empresa Siderurgica, S.A., dated November 11, 1944, as "Kaiser contract"; and the contract between Vanderburgh & Co., Inc. and Bigge Drayage Co., dated December 2, 1944, as "Bigge contract".

At the time of the execution of the Kaiser contract or shortly thereafter, there was deposited in escrow $50,000 in accordance with Article V of the Kaiser contract.

Article IV of the Kaiser contract (Exhibit "1") provides as follows:

"IV. Parties hereto expressly agree that title to the cement plant with the exception of the items set out in "Exhibit B" shall be transferred to and vest in Purchaser, and Frank P. Dow, Inc., as Forwarding Agent and Customs [fol. 37] Broker for Purchaser, or such other Forwarding Agent and/or Customs Broker as may be hereafter elected by Purchaser, shall coincidentally take delivery from Seller for preparation for shipment and for shipment to Pur-

chaser in the Republic of Colombia, immediately upon the occurrence of the following two conditions:

"A. The issuance by the appropriate government officials of the Export Permit or License required by Article III above; and

"B. The establishment of a letter of credit in accordance with Article V hereof.

"After such transfer of title, all risk and liability for any loss or damage to the cement plant, of any nature whatsoever, shall be upon the Transfer Agent and/or Purchaser, and Seller shall be relieved of any risk and liability."

The effective date of the Bigge contract was provided for by Paragraph 10, which we quote as follows:

> "10. It is specifically agreed by forwarding Agent and Contractor that the effective date of this contract shall be immediately upon the occurrence of the last of the following three conditions, at which time it shall become operative and binding upon the respective parties, provided such effective date is on or before Ninety (90) days from date hereof, unless extended at the option of Contractor:
>
> [fol. 38] "A. The approval of this contract by a duly authorized agent of Purchaser; and
>
> "B. The issuance by the appropriate government officials of an export permit or license required by Article III of said Exhibit One.
>
> "C. Notice approved by Seller to Contractor that Purchaser has acquired title and Forwarding Agent has right to possession."

On December 15, 1944, the Foreign Economic Administration in Washington, D. C. issued Export License SP #2086 to the Kaiser Company, a photostatic copy of which License is attached hereto marked Exhibit "5" and incorporated herein by reference.

On January 3, 1945, a letter of credit covering the balance of the purchase price of said cement plant was deposited with the Bank of America, N. T. & S. A., in favor of the Kaiser Company, a copy of which is attached hereto marked

Exhibit "6" and incorporated herein by reference.

On January 3, 1945, a letter was delivered to Bigge from Vanderburgh, approved by Kaiser Company, which provided as follows:

> "In accordance with Paragraph 10 C of our Contract with you dated December 2, 1944, you are hereby notified that on this date purchaser acquired title and we took delivery of the Cement Plant, and the undersigned as Forwarding Agent has the right to posses-
> [fol. 39] sion."

a copy of which letter is attached hereto marked Exhibit "7" and incorporated herein by reference.

Thereupon, on said date, January 3, 1945, Vanderburgh & Co., Inc. and Bigge Drayage Co. entered into possession of the said plant and immediately began to dismantle and disassemble the said plant and package it on the site, in preparation for shipment abroad to Colombia, South America.

On or about January 18, 1945, Kaiser Company gave to Vanderburgh a power of attorney to do and perform on its part and behalf any thing or act necessary or proper in connection with the transportation or exportation of any merchandise shipped under export license SP#2086 issued to Kaiser Company and covering the said cement plant; copy of said corporation power of attorney is attached hereto marked Exhibit "8" and incorporated herein by reference.

The (a) dismantling, (b) packaging and (c) delivery to the Atchison, Topeka and Santa Fe Railway Co. by Bigge and the (d) shipping operations and (e) actual shipment of the said cement plant and equipment continued expeditiously with due regard for war time shipping conditions throughout January, 1945 and the succeeding months; the packages being labeled at the plant site consigned to Empresa Siderurgica, S. A., Medellin, Colombia, South America.

On March 5, 1945, J. Emmett McNamara, County Assessor of Merced County assessed personal property taxes in the sum of Nine Thousand Ninety Dollars ($9,090.00) [fol. 40] against the said cement plant, identified as "personal property located on S½ of S¼ of Section 12-7-13"

and valued at Three Hundred Thousand Dollars ($300,000.00). Copy of the assessment statement for personal property taxes is attached hereto marked Exhibit "9", and incorporated herein by reference. At the time of such assessment, twelve per cent (12%) of the dismantled plant were out of the jurisdiction of the County of Merced. Attached hereto is a letter from Bigge giving an estimated status of the plant as of March 5, 1945; this letter is marked Exhibit "10" and is incorporated herein by reference.

Thereafter, on August 31, 1945, Empresa Siderurgica, S. A. and Vanderburgh & Co., Inc. as Forwarding Agent on behalf of itself and Empresa Siderurgica, S. A., paid under protest the personal property tax on the said cement plant and equipment in the amount of Seven Thousand Nine Hundred Ninety-nine Dollars and Twenty Cents ($7,999.20) to the Assessor's office, County of Merced. Copy of the receipt for such tax paid under protest is attached hereto marked Exhibit "11" and incorporated herein by reference.

On September 1, 1945, upon the recommendation of J. Emmett McNamara, County Assessor of the County of Merced, the Board of Supervisors of the County of Merced voted to reduce the assessment valuation from the Three Hundred Thousand Dollars ($300,000.00) to Two Hundred [fol. 41] Sixty Four Thousand Dollars ($264,000), said reduction being made by reason of the fact that the said twelve per cent (12%) of such assessed property was out of the jurisdiction of the County of Merced on the date of the assessment of the tax, March 5, 1945. Copy of excerpt from the minutes of the Board of Supervisors of Merced County, September 1, 1945, is attached hereto marked Exhibit "12" and incorporated herein by reference.

On January 18, 1946 the entire plant had been packaged and shipped out of and had left the County of Merced, and on January 29, 1946 the whole of the said plant covered by the said contract had been completely shipped out of the State of California and the United States. Attached hereto marked "Exhibit "13" and incorporated herein by reference is a list of the cars billed and shipped comprising all of said Yosemite Portland Cement Plant.

Thereafter this present action was initiated by Empresa Siderurgica, S. A. and Vanderburgh & Co., Inc. to recover

the amount of the aforesaid personal property taxes paid under protest to Defendants herein.

Dated this 5th day of July, 1946.

Ward, Kellogg & Simmons, by (S) Betsy FitzGerald Rahn, Attorneys for Plaintiffs, Claude H. Adams, William R. Elam, Attorneys for Defendants.

[fol. 42] EXHIBIT "1"

Contract of Sale

This contract dated this 11th day of November, 1944 by and between the Henry J. Kaiser Company, a Nevada corporation, having its principal office in Oakland, California, hereinafter called "Seller"; and Empresa Siderurgica, South America, a corporation incorporated under the laws of the Republic of Colombia and having its principal office at Medellin, Republic of Colombia, hereinafter called "Purchaser":

Witnesseth That

Whereas Seller is the owner of that certain cement plant, heretofore known as Yosemite-Portland Cement Plant located at Merced, California, including all machinery, equipment, removable structures, removable facilities, spare parts, supplies and miscellaneous items comprising said plant excluding the land upon which the plant is situated, all of which is hereinafter referred to as the "cement plant."

Whereas Seller is also the owner of certain machinery, equipment, structures, facilities, spare parts, and supplies previously located at a certain quarry at Emory, California, previously operated in conjunction with said Yosemite-Portland Cement Plant, which machniery, equipment, structures, spare parts, and supplies have been dismantled from their previous location and transported to the site of the main plant at Merced, and which for the purposes of this contract shall be included a part of the cement plant as [fol. 43] above described; and

Whereas Purchaser has completely inspected and is fully familiar with said cement plant in its present condition and location and is desirous of buying said cement plant,

with certain specific exceptions hereinafter mentioned in its present condition and as presently situated, for the purpose of exporting the said plant to the Republic of Colombia.

Now therefore the parties hereto do mutually agree as follows:

I. Seller agrees to sell and Purchaser agrees to buy the said plant, subject, however, to the covenants and conditions herein set forth.

II. A. Attached hereto as "exhibit A" and by this reference made a part hereof, is an itemized list of spare parts, supplies and miscellaneous items now located on the premises of the said cement plant. It is agreed that in the event that any item or part thereof listed in said "Exhibit A" is missing and cannot be located and delivered to Purchaser, Purchaser shall be entitled to a reduction in the total purchase price hereinafter provided in an amount equal to the list value of each item or portion thereof which is missing or which cannot be delivered to Purchaser, as such value is shown on said "Exhibit A", provided, however, that any claim for a reduction in price by reason of any such shortage must be asserted by Purchaser within [fol. 44] sixty (60) days after the transfer of title to said cement plant as herein provided, and provided further that Seller shall not be responsible for any items known to be present in the inventory, but damaged or destroyed after the date of execution of this agreement. It is further understood that prior to the expiration of the period within which Purchaser may make claims for items missing, Seller shall have the right to control the withdrawal of any items of inventory and shall have the right during said period to take such action as it deems necessary to protect and recover any items of said inventory. It is expressly understood and agreed that the values listed on said "Exhibit A" are solely for the purpose of determining the amount of deduction for missing items as provided in Article II of this contract and do not represent the sales price of the respective items listed.

B. Seller has delivered to Purchaser an approximate list, prepared by the American Appraisal Company, of the items composing the remainder of said cement plant. All parties fully understand and agree that said list was pre-

pared by a party other than Seller, and that while said list is true and correct to the best of Seller's knowledge and belief, Seller does not guarantee or assume any responsibility for the accuracy or completeness of said list, and that neither said list nor the delivery thereof to Purchaser shall in any way become a part of or affect the terms of [fol. 45] this contract.

C. Certain specific items of machinery, equipment, structures, facilities, parts, supplies, and or other items as listed in "Exhibit B" attached hereto and by this reference made a part hereof, are specifically excluded from the cement plant to be sold to Purchaser under this Agreement, and title to all of said items in "Exhibit B" shall remain in Seller or third party.

D. Purchaser shall purchase said plant in its condition and location as of the date of this agreement. Any loss, damage or destruction of the plant occurring after the date hereof shall be at the risk of Purchaser, except that Purchaser shall be entitled to a credit for items missing from "Exhibit A" as hereinbefore provided and provided further that in the event the parties are unable to obtain the export permit or license referred to in Article III hereof and as a result thereof this agreement is terminated, Purchaser shall not be liable to Seller for any loss, damage, or destruction of any kind to said plant which may have theretofore occurred. Seller, at its own cost, agrees to add Purchaser as a coinsured as its interests may appear to presently existing insurance coverage covering the cement plant, to so remain until transfer of the title to the plant hereunder.

E. Seller expressly warrants that Seller is now the owner of said cement plant and that title to the cement plant shall [fol. 46] vest in Purchaser free of all liens and encumbrances. Seller represents that said cement plant was being operated until July 1, 1944, that Seller purchased said cement plant from its former operator in operating condition as of that time, and Seller warrants that it has not thereafter sold or removed any equipment or property from said cement plant except that listed in "Exhibit B", attached hereto. Seller makes no warranty as to the condition of said plant or any part thereof and no other warranties or representations are made or implied by Seller except as herein expressly set forth.

F. Seller has left certain minor items or property, which Seller did not consider worthwhile to remove, at the quarry above referred to. In the event Purchaser desires any property remaining at the quarry, and which is owned by Seller, it may take the same hereunder without any increase in the purchase price provided that it notifies Seller in writing of its desire to do so at any time after the date hereof and prior to sixty (60) days after the transfer of title to the cement plant as herein provided. Title to said property shall be transferred in the same manner as title to the cement plant is transferred hereunder, and at the same time that title to said cement plant is transferred hereunder or at such time as Purchaser notifies Seller in writing of its election to take said property whichever time shall be later, where is, as is, and subject to all other [fol. 47] conditions of this agreement. Said property shall be removed from the premises at Purchaser's risk and expense within ninety (90) days after the date hereof, or title thereto shall revert to Seller.

III. Both parties agree to use their best efforts to obtain, at the earliest possible date the issuance by the appropriate authorities of the United States Government of an Export Permit or License which will permit the exporting of said cement plant to Purchaser in the Republic of Colombia. The issuance of such Export Permit or License to either Purchaser or Seller shall be compliance with the condition set forth in this Article, provided only that said permit or license shall be sufficient to permit the exporting of said cement plant to the Republic of Colombia as herein specified. In the event that such Export Permit or License is not obtained within forty five (45) days from the date hereof, unless said period shall be extended by mutual agreement of the parties, this contract and all obligations hereunder shall terminate.

IV. Parties hereto expressly agree that title to the cement plant with the exception of the items set out in "Exhibit B" shall be transferred to and vest in Purchaser; and Frank P. Dow, Inc., as Forwarding Agent and Customs Broker for Purchaser, or such other Forwarding Agent and or Customs Broker as may be hereafter elected by Purchaser, shall coincidentally take delivery from Seller [fol. 48] for preparation for shipment and for shipment

to Purchaser in the Republic of Colombia, immediately upon the occurrence of the following two conditions:

A. The issuance by the appropriate government officials of the Export Permit or License required by Article III above; and

B. The establishment of a letter of credit in accordance with Article V hereof.

After such transfer of title, all risk and liability for any loss or damage to the cement plant, of any nature whatsoever, shall be upon the Transfer Agent and/or Purchaser, and Seller shall be relieved of any risk and liability.

V. In consideration of the sale of said entire cement plant, Purchaser agrees to pay to Seller a total purchase price of Five Hundred Fifty-five Thousand Dollars ($555,000.00). The terms of the payment of said purchase price shall be as follows:

A. Immediately upon the execution of this contract, Purchaser will deposit in escrow with the Bank of America, National Trust and Savings Association, San Francisco office, hereafter called "Bank of America", the sum of Fifty Thousand Dollars ($50,000) in lawful money of the United States of America, said sum to be held in escrow until an Export Permit or License is issued as required by the provisions of Article III above, and paid to Seller [fol. 49] immediately upon the presentation to the escrow holder of a photostatic copy or certified copy of said permit or license, in accordance with escrow instructions executed concurrently herewith.

B. Within ten (10) days after the presentation to the escrow holder of a certified copy or photostatic copy of said Export Permit or License as provided in Section A above, Purchaser shall establish an irrevocable letter of credit confirmed by a prime bank in New York City, New York, or San Francisco, California, in a total amount of Five Hundred Five Thousand Dollars ($505,000.00) in lawful money of the United States of America, available by draft at sight, with New York or San Francisco funds payable at par.

C. The terms of said letter of credit shall provide that cash payments shall be made to Seller at San Francisco, California, as follows:

(1) Either party may present to the confirming bank through which payments are to be made, a photostatic copy or certified copy of an Export Permit or License permitting the export of the cement plant to the Republic of Colombia, together with a certificate executed by Seller stating that said permit or License covers the cement plant sold to Purchaser hereunder, and thereafter payments shall be made on the following dates:

[fol. 50] (a) The sum of One Hundred Twenty-six Thousand Two Hundred Fifty Dollars ($126,250.00) forty-five (45) days after the date said copy of the Export Permit or License is presented to the Bank.

(b) The sum of One Hundred Twenty-six Thousand Two Hundred Fifty Dollars ($126,250.00) ninety (90) days after the date said copy of the Export Permit or License is presented to the bank.

(c) The sum of One Hundred Twenty-six Thousand Two Hundred Fifty Dollars ($126,250.00) one hundred and thirty-five (135) days after the date said copy of the Export Permit or License is presented to the bank.

(d) The sum of One Hundred Twenty-six Thousand Two Hundred Fifty Dollars ($126,250.00) one hundred eighty (180) days after the date said copy of the Export Permit or License is Presented to the bank.

(2) In the event shipment of the entire plant from Merced shall be completed prior to the time or times here specified, Purchaser shall deliver to Seller a certificate stating that such removal has been completed, and upon presentation of said certificate to the confirming bank through which [fol. 51] said letter of credit is payable, any balance of the purchase price then payable shall be paid to Seller forthwith.

D. Any and all taxes now or hereafter imposed upon Seller as a result of the sale of said plant, excepting only such taxes as may be based upon the income or profits of Seller and any taxes levied upon any property retained by Seller, shall be for Purchaser's account, and Purchaser shall

reimburse Seller for any such taxes paid by Seller upon the presentation to Purchaser of an invoice covering such payments. With respect to any such taxes levied against and paid by Seller and reimbursed by Purchaser as herein provided, Purchaser shall have the right to institute and maintain in Seller's name such litigation as Purchaser may deem necessary or desirable to test the legality or proper levy of such taxes. Seller shall be liable for all property taxes which accrue against said cement plant prior to vesting of title in Purchaser, but Purchaser shall be liable for all such property taxes which accrue against said cement plant after title vests in Purchaser.

E. The damages that may result to Seller from any breach of this contract by Purchaser will be difficult, if not impossible, of ascertainments. In the event that Purchaser fails to establish the letter of credit in the manner and within [fol. 52] the time required by Article V hereof, or fails to perform any condition or covenant contained in this contract, Seller may, at its option, in lieu of any other remedy allowed to it by law, retain the initial payment of Fifty Thousand Dollars ($50,000.00) as liquidated damages.

VI. Purchaser shall have a reasonable time after the issuance of the Export Permit or License and the establishment of the letter of credit to remove the plant from the property of Seller, but in any event Purchaser may leave the cement plant or any portion thereof on the premises until Purchaser is able to obtain required shipping space. Upon completion of the removal of the plant, Purchaser shall leave the property in an orderly condition, and title to any property then remaining on the premises shall revert to Seller. Purchaser may leave exposed any foundations and structures which Purchaser does not desire to remove.

VII. This contract shall be the entire agreement between the parties hereto with respect to the purchase and sale of said cement plant and the components thereof, and the obligations of neither party hereto shall be in any way affected by or dependent upon any condition, representation or agreement not expressly contained in the provisions hereof:

IX. Any notice required or permitted hereunder may be given by either party or its authorized representative to [fol. 53] the other party by deposit of the same in the United

States mail or in the Colombian mail, as airmail registered matter, postage prepaid, and addressed as follows:

If to Seller: Henry J. Kaiser Company. Attention: Mr. E. E. Trefethen, Jr., 1522 Latham Square Building, Oakland 12, California.

If to Purchaser: Empresa Siderurgica, S. A. Medellin, Colombia, S. A.

or such other place as may be designated in writing by the respective parties.

In Witness Whereof the parties hereto have executed this contract as of the day and year first above written.

Henry J. Kaiser Company, (S.) E. E. Trefethen, Jr., Vice President; Empresa Siderurgica, S. A., by (S.) Julian Cock Arango.

[fol. 54] EXHIBIT "2"

Contract for Dismantling and Preparation for Shipment of Yosemite-Portland Cement Plant

Vanderburgh & Co., Inc., a California corporation, having its principal office at San Francisco, California, acting as Forwarding Agent (hereinafter referred to as "Forwarding Agent") for Empresa Siderurgica, S. A., a corporation incorporated under the laws of the Republic of Colombia and having its principal office at Medellin, Republic of Colombia (hereinafter referred to as "Purchaser"), and Bigge Drayage Co., a California Corporation, having its principal office at Oakland, California (hereinafter referred to as "Contractor"), hereby agree that the following work shall be performed for the compensation and upon the terms and conditions hereinafter set forth:

1. Purchaser has heretofore, on November 11, 1944, entered into a contract with Henry J. Kaiser Company (hereinafter referred to as "Seller"), which said contract, including its exhibits, is attached hereto, marked "Exhibit One," for the purchase of the Yosemite-Portland Cement Plant, located at Merced, California, and the quarry equipment formerly located at Emory, California, including all of the machinery, equipment, removable structures, removable facilities, spare parts, laboratory, supplies and miscellane-

ous items comprising said plant, all of which plant and quarry equipment is the subject of this contract and is hereinafter referred to as the "Cement Plant". All of the parties hereto acknowledge that they have read said Exhibit One, and know the contents and terms thereof.

[fol. 55]

2. The Forwarding Agent hereby represents that he has been designated by Purchaser to take delivery of said Cement Plant from the Seller for preparation for shipment and for shipment to Purchaser in the Republic of Colombia.

3. The Forwarding Agent further represents that he has agreed with Purchaser that Purchaser may designate some other forwarding agent and/or customs broker in substitution for him at any time, and that in the event of substitution, he has agreed to deliver possession of said Cement Plant to such other forwarding agent and/or customs broker as may be designated by Purchaser, upon written notice by Purchaser that such other forwarding agent and/or customs broker has been selected in his place and stead.

4. In the event the Purchaser exercises its right to substitute other forwarding agents and/or customs brokers, written notice of such substitution and/or substitutions shall be given to the Contractor, and the parties so substituted shall execute written consents to this agreement and deliver copies thereof to Contractor, and the Contractor agrees that the requirements of this contract shall remain in full force and effect as though no substitution and/or substitutions had been made and as if said substituted forwarding agent or agents and/or customs broker or brokers had

[fol. 56]

been named as an original party to this agreement.

5. Forwarding Agent and Purchaser have appointed Vanderburgh & Co., Inc., a New York corporation, 25 Beaver Street, New York, New York, to act as Fiscal Agent (hereinafter referred to as "Fiscal Agent") for Forwarding Agent and Purchaser for the purpose of making payments required by this contract.

6. For the purposes of this agreement, Vanderburgh & Co., Inc., is also designated an authorized general agent of Purchaser.

7. The Forwarding Agent and Purchaser shall select an individual, whose name and address shall be communicated to Contractor before the work hereunder is commenced, to

act as the joint representative (hereinafter referred to as "Representative") at the site of the work. Such Representative has authority to authorize in writing exceptions to dismantling, packing and shipping specifications contained herein.

8. The Purchaser has employed Kaiser Engineers, a corporation (hereinafter referred to as "Kaiser"), to perform consulting engineering services in connection with the dismantling and preparation for shipment of said Cement Plant.

9. It is expressly understood by all of the parties hereto that the Forwarding Agent cannot and shall not enter [fol. 57] into any other contract or incur any other obligation in connection with this contract, or the work covered hereby, without first obtaining the written authorization of the Purchaser, and any such other contract entered into, or obligation incurred, without such written authorization, shall be null and void as to all parties concerned, and shall not be binding upon either the Purchaser or the Forwarding Agent. For the purposes of this paragraph, however, approval by the Fiscal or General Agent shall be considered approval by Purchaser.

10. It is specifically agreed by Forwarding Agent and Contractor that the effective date of this contract shall be immediately upon the occurrence of the last of the following three conditions, at which time it shall become operative and binding upon the respective parties, provided such effective date is on or before Ninety (90) days from date hereof, unless extended at the option of Contractor:

A. The approval of this contract by a duly authorized agent of Purchaser; and

B. The issuance by the appropriate government officials of an export permit or license required by Article III of said Exhibit One.

C. Notice approved by Seller to Contractor that Purchaser has acquired title and Forwarding Agent has right to possession.

[fol. 58] 11. The Contractor shall supply all supervision, labor, tools, implements, machinery, equipment and materials, which in its judgment are necessary to dismantle said

Cement Plant, and to pack and prepare the same for shipment in such manner as Contractor deems appropriate and in accordance with the best practices of the export trade, and load on cars for shipment to a designated port in the United States of America for shipment to Purchaser in the Republic of Colombia.

12. The work of dismantling the Cement Plant is to be performed in accordance with the terms of this contract and in the manner which, in Contractor's judgment, is likely to do the least possible damage to the various parts thereof and to assure safe carriage to destination in the Republic of Colombia.

13. When notified that steamship space is available and permit has been obtained by the Forwarding Agent from the Association of American Railroads, it shall be the duty of the Contractor to exercise reasonable diligence and good faith to obtain and to exert every effort to load such railroad cars at Cement Plant siding as are necessary to transport such parts of the Cement Plant as are designated to the port designated. In designating items for loading the Forwarding Agent shall consult with Contractor in selecting items in such manner as will result in the most economical loading Contractor, on behalf of Forwarding Agent, [fol. 59] shall obtain signed railroad bills of lading marked for export and consigned to Forwarding Agent, care of a steamship company, freight collect. For the purposes of this paragraph, the burden of exerting every effort will be satisfied if Contractor works Eight (8) hours per day and Six (6) days per week.

14. Contractor shall take at least one photograph of each machine or piece of equipment before dismantling said machine or piece of equipment, and shall also take at least one photograph after such machine or piece of equipment is dismantled. Such photographs shall be numbered and bear the same identification marks as the parts of which they are pictures, and shall be kept in numerical order, or such other adequate filing system, as may be approved by Representative so as to be readily accessible to persons reassembling the plant.

15. Within Ten (10) days after the effective date of this contract, the Contractor shall enter upon and undertake the

work of dismantling the Cement Plant and the preparation for shipment thereof, and shall continue the dismantling and preparation for shipment of the dismantled parts without cessation of work until said Cement Plant has been completely dismantled and prepared for shipment, with the exception of the traveling crane and crane bay. Completely dismantling the Cement Plant does not involve any of the following items:

[fol. 60] A. Removing foundations.
B. Filling of any excavations.
C. Removing concrete smokestacks.
D. Exhibit B attached to Exhibit One.
E. Rail ties in place.

Said Cement Plant shall be prepared for shipment in the following order:

First: The laboratory equipment.
Second: All of the spare parts and machinery listed in Exhibit A of Exhibit One.
Third: The quarry equipment.
Fourth: The machinery and shop equipment.
Fifth: The balance of the plant and equipment intended to be shipped in such order as the Contractor may determine.

Items First and Second above shall be prepared for shipment within Fifty (50) days from the effective date of this contract.

16. The Contractor shall complete the dismantling and preparation for shipment within Six (6) months from the effective date hereof. The dismantled and packed equipment shall be loaded on cars as directed by the Forwarding Agent, in accordance with paragraph 13. If through no fault of the Contractor, completion of shipment of the Cement Plant is delayed beyond one (1) year from the effective date hereof, Contractor shall be discharged from [fol. 61] all of his unperformed obligations under this contract, except the obligation to dismantle the traveling crane and crane bay, if the same is not then dismantled, and Contractor shall be paid the entire undisbursed balance of the contract price less the Contractor's estimated cost of dismantling the traveling crane and crane bay and load-

ing the unshipped portion of the Cement Plant on railroad cars at the site. If at any time after twelve (12) months and within eighteen (18) months after the effective date hereof, the Contractor is called upon to load the unshipped portion of the Cement Plant, and there is an increase in the Contractor's costs, the Contractor shall be paid the amount of such increase in costs, plus the undisbursed balance of the contract price, said additional costs to be subject to agreement between the parties before the work is to be done.

17. For the purposes of this contract one kilo equals 2.2 pounds and one thousand kilos equals 2200 pounds.

18. All separations shall be made at the point of joinder, and there shall be no cutting or disassembling of any part of the Cement Plant which will have as its effect the weakening of the structure or parts when such structure or parts are reassembled, except as may be specifically directed in writing by the Representative.

19. All cylindrical parts are to be separated at the point of joinder in sections not more than 25′ in length and 125″ [fol. 62] in diameter; provided, however, that if any single section without a point of joinder is more than 25′ in length or 125″ in diameter, said section shall be shipped as a unit and shall not be cut or divided to meet the above limitations. Said cylindrical parts which are of sufficient diameter are to be used to stow other parts of smaller size inside, including, but not limited to, other cylindrical parts, corrugated iron, rails and wood pieces. The parts stowed inside of the cylindrical pieces shall be well nested, and wedges, braces or blocks inserted where necessary in Contractor's judgment to hold the parts securely in place and prevent slipping or shifting. The parts stowed inside of the cylindrical pieces shall not exceed the length of the cylindrical pieces. Each cylindrical section when packed shall not exceed 25 thousand kilos gross weight.

20. All parts other than the cylindrical sections shall be separated at their point of joinder in sections not more than 25′ in length, 140″ in width and 80″ in height and having a gross weight of not more than 5 thousand kilos. Provided, however, that if any single section without a point of joinder is more than 25′ in length, 140″ in width and 80″

in height or weights more than 5 thousand kilos, said section shall be shipped as a unit and shall not be cut or divided to meet the above limitations. The Contractor shall not leave any parts of the plant machinery or equipment projecting which would leave such parts susceptible to damage [fol. 63] in transit.

21. The hubs of the machines in the primary and finishing mills shall not be removed.

22. All flanges and flange sections shall be removed.

23. If the Representative believes the limitations contained in any specifications herein contained are unnecessary, or improper, he may in his absolute discretion waive such limitation, in writing, as to any particular piece or part of said Cement Plant.

24. All delicate parts, such as laboratory equipment, glass, switchboard or control apparatus, must be securely and carefully packed in cases so as to prevent breaking or crushing in shipment.

25. Any motors, machinery or other parts, such as electrical equipment, which would be damaged by exposure, shall be packed so as to prevent exposure, corrosion or other damage.

26. Any part or machine which, in Contractor's judgment, is too heavy to be crated easily and which, in Contractor's judgment, is not likely to be damaged in shipment and which, in the ordinary case of shipping for export, would usually be mounted on skids, shall be so mounted.

27. Tank plates shall be bundled, and shall also be nested wherever possible.

28. The Contractor may have for packing purposes the free use of any of the wood framing or any of the material [fol. 64] contained in Exhibit A attached to Exhibit One now at the site of said Cement plant and owned by Purchaser.

29. All new and unused bricks of any kind must be crated. Such crates not to exceed 150 kilos gross packed weight.

30. All magnesite bricks or high alumina bricks must be removed and packed in such form and in such containers as the Contractor may determine.

31. Upon written request of the Representative the Contractor will set aside any other refractory bricks and submit proposal to Representative and Fiscal Agent to cover the cost of packing said bricks. Upon written authorization from said Fiscal Agent, Contractor may then pack at additional cost authorized.

32. Any part, piece, crate, case or machine which is to be shipped as a unit shall be clearly and plainly marked and numbered in numerical order, commencing with number one, as follows:

SIDERURGICA
Buenaventura

1

33. The Contractor shall match-mark all parts of the plant and equipment in accordance with a method approved by Kaiser, and all machines must have a master identification mark. All manufacturers' identification marks and/or serial numbers shall be preserved. All marking and [fol. 65] numbering shall be done with waterproof paint or paint covered with shellac.

34. The Contractor shall prepare in sextuplicate a complete packing list, enumerating, listing and describing every article which is prepared for shipment, including the individual items packed in each case or crate. Such list shall contain the following information:

Number
Type of packing
Material (packing list)
Net Lbs.
Gross Lbs.
Net Kilos
Gross Kilos
Measurements

The Contractor shall deliver to the Representative at the Cement Plant site original copy of the packing list and shall mail four (4) copies to the Forwarding Agent as promptly as each sheet is prepared.

35. The Representative, without risk to Contractor, shall have the right to withdraw any piece or part of the Cement Plant which may be in need of repairs from the custody of the Contractor and to have same repaired and returned to the Contractor at job site for carting and/or packing for shipment.

36. Forwarding Agent shall pay, or cause to be paid, [fol. 66] to Contractor as and for compensation for the performance of this Contract the full sum of One Hundred and Twenty Thousand Dollars ($120,000.00) as follows:

On or before the Tenth day of each month following the effective date hereof, the Contractor shall submit to Kaiser a progress estimate covering the work performed up to the close of the preceding month. The Forwarding Agent shall pay, or cause to be paid, to the Contractor, through Fiscal Agent, progress payments equal to Ninety-five Per Cent (95%) of the total sum due as shown by the progress estimate as approved by Kaiser. Payment shall be made to Contractor at its Oakland office not later than the end of the month following the month to which the estimate relates. Fiscal Agent shall withhold Five Per Cent (5%) from the approved progress estimates, pending final completion of this contract. Upon completion of the contract the amount withheld shall be paid to Contractor by Fiscal Agent, but if through no fault of the Contractor, completion of shipment of the Cement Plant is delayed beyond One (1) year from the effective date hereof, said payments so withheld shall be paid at the expiration of said One (1) year period.

37. It is specifically understood that no payment made under this contract, except the final payment, shall be evidence of the performance of this contract either in whole or in part, and no payment, including final payment, shall be [fol. 67] construed to be an acceptance of defective or improper workmanship.

38. The Contractor shall reimburse the Fiscal Agent for the electric power used at the plant from and after the date of commencing work under this contract until such time as he shall notify the Fiscal Agent in writing that the dismantling work has been completed, except for the traveling crane, and that he will no longer require the use of said electric power for dismantling purposes. Thereafter the

Contractor shall have the use of the electric power without charge for the operation of the traveling crane.

The Fiscal Agent shall pay for the electric power on standby charge and shall charge the Contractor's account for the amount thereof in accordance with this paragraph.

39. The Contractor shall neither have nor assume any liability nor responsibility for any of the property to which contract relates, save and except that the Contractor shall be liable for the wilful and negligent acts of its officers, agents, employes and servants, including theft, by any of said persons of any of such property.

40. The Contractor expressly agrees, with respect to the work to be performed under this contract, to maintain the following types and amounts of insurance:

Type of Insurance	Policy Limits of Liability
Contractual Public Liability	$100/$200,000.00
Contractual Property Damage	$100,000.00
[fol. 68] Automobile Public Liability	$100/$200,000.00
Automobile Property Damage	$100,000.00
Rigging—inland marine cargo	$25,000.00
Trucking—inland marine cargo	$25,000.00
Compensation	California Statutory Coverage

41. The Contractor shall be required to furnish to Fiscal Agent Certificates of insurance under said policies for all of the work covered herein, as set forth in paragraph 40 above, which shall provide Ten (10) days' notice to Fiscal Agent before any change or cancellation may be effected.

42. Contractor shall have the free use of any equipment or machinery located on the premises, including the overhead craneway and the RD8 Tractor, provided that the Contractor shall be responsible for any damage to such equipment or machinery resulting from negligent use and wilful injury. Upon notice by the Contractor to the Purchaser that any such items are not in operative condition, Purchaser shall cause them promptly to be put in such condition.

43. Contractor shall employ only union labor for the performance of the work and shall pay such labor the going union rate for both regular time and overtime; provided,

however, that the Contractor shall not be entitled to any [fol. 69] increased compensation because of any overtime which he may be required to pay in order to meet the performance schedule provided for herein.

44. Forwarding Agent shall reimburse Contractor for cost of containers for high alumina brick only.

45. Contractor shall load the items of Cement Plant on railroad cars at the site at the Cement Plant and secure the same when loaded in such manner as in Contractor's judgment shall be necessary and proper and when such property has been loaded upon cars, as aforesaid and receipted for by the carrier, Contractor shall be conclusively presumed to have fulfilled all of its obligations under this contract with respect to the property so loaded, except any obligation incurred by Contractor resulting from negligent or wilful damage to such property.

46. Prior to the effective date of this contract, Fiscal Agent shall provide the Contractor with assurances satisfactory to and approved in writing by Contractor as to form and substance, of the availability of funds in New York, New York, or San Francisco, California, sufficient to pay Contractor all amounts which Contractor shall be entitled to receive from Forwarding Agent under the terms and provisions of this contract. In the event Contractor does not approve said assurances within Ten (10) days after presentation to Contractor by Fiscal Agent, this contract shall be null and void and the same as if this contract had [fol. 70] not been executed.

47. The acceptance by either party of any payment or performance hereunder after the time for such payment or performance or in a manner different from the manner of performance as provided for herein shall not be deemed a waiver of any of the terms or provisions hereof, or of any subsequent default or a consent to any subsequent departure from the terms and provisions hereof.

48. Forwarding Agent shall indemnify Contractor and save it harmless from all damage, loss, cost, liability, claims and expense on account of injury to persons or property, including Contractor's property on the premises of the Cement plant caused by the negligent or wilful acts of For-

warding Agent, its agents, servants, employes and contractors.

49. Any notice or demand that either party hereto desires or may be required to give to or make upon the other hereunder shall be in writing either delivered personally or sent by pre-paid registered mail addressed to the other as follows:

Contractor: Bigge Drayage Co., 24th and Campbell Streets, Oakland 7, California.

Fiscal Agent: Vanderburgh & Co., Inc., 25 Beaver Street, New York 4, New York.

[fol. 71] or to such other address as either may communicate to the other by the means herein prescribed for giving notice. Notice by prepaid registered mail, addressed as aforesaid, shall be deemed fully communicated at the expiration of Seven (7) days from the time of the mailing thereof.

50. It shall be the duty of the Representative, during the progress of the dismantling of Cement Plant and the preparation of the same for shipment to observe and inspect the work of dismantling and preparation for shipment. As each item so dismantled and prepared for shipment is tendered to Representative, together with the packing list therefor, as specified in paragraph 34 hereof, it shall be the duty of Representative to accept the same and execute and deliver to Contractor a receipt therefor on a form provided by Contractor, provided that all bona fide exceptions which may have been made by the Representative, as provided herein, have been adjusted in accordance with the provisions of this contract. Anything in this agreement to the contrary notwithstanding, such receipt shall be conclusive evidence that Contractor has fulfilled his obligations to dismantle and prepare for shipment the items receipted for in the manner required by this contract. The Contractor represents that each item or package contains the item enumerated on the packing list at the time of delivery, and the receipt by the Representative does not acknowledge correctness of contents of closed container by Forwarding [fol. 72] Agent or Purchaser of the contents.

51. In the performance of the work provided for herein, Contractor shall operate as an independent Contractor and

not as the agent, employe or servant of the Forwarding Agent, and or the Purchaser and or the Fiscal Agent.

52. Contractor shall complete the work provided for herein without causing any mechanics' or materialmen's liens to be imposed upon the Cement Plant or the property on which it is situated.

53. The Contractor shall promptly refer any question as to interpretation of the specifications or manner or method of performing the work covered herein to the Representative, and if the Contractor and the Representative agree on the question, their determination thereof shall be final. If the Contractor and the Representative disagree on the question it shall be immediately referred to Kaiser, and Kaiser's determination thereof shall be final.

54. The Contractor shall not assign or transfer any part or all of this contract, nor shall the Contractor assign any moneys due or to become due hereunder without prior written consent of the Fiscal Agent, and any attempted assignment hereunder without such prior written consent shall be null and void. No drafts for subcontracted work will be allowed.

55. Contractor shall incur no liability to purchaser because of any delays in performing any of its obligations [fol. 73] hereunder or because of its inability to perform any of such obligations when, without the fault or negligence of Contractor, any such delays or inability to perform results from fires, floods, strikes, labor difficulties of any kind, accidents, acts of God or of the public enemy, embargoes, delay in transportation, non-availability of labor or materials, or because of any other causes or contingencies beyond Contractor's control and whether the same as or different from the causes and contingencies hereinbefore enumerated. Contractor shall promptly notify Purchaser of any such cause or contingency delaying or interfering with the performance of any of its obligations hereunder.

56. If Forwarding Agent shall default in the performance of any of its obligations hereunder, and if such default shall continue after communication of Fifteen (15) days' notice in writing to Forwarding Agent, specifying the nature of such default, Contractor, at its option, shall be released from all further obligations hereunder, without prejudice

to any other rights or remedies available to Contractor on account of such default, the Contractor's rights and remedies being cumulative. Such release shall not absolve Forwarding Agent from paying all sums payable under progress estimates to date to Contractor at the time of such release. The full amount recoverable hereunder shall not exceed the full amount recoverable by Contractor from Forwarding Agent under this contract.

[fol. 74] 57. If the Contractor fails to complete said work within such time, or refuses or fails to comply with any of the other terms and conditions of this contract, and if such default shall continue after communication of Fifteen (15) days' notice in writing to the Contractor, specifying the nature of such default, the Forwarding Agent and/or the Purchaser may terminate its right to proceed with the work or any part thereof. In such event, the Forwarding Agent may take over the work and prosecute the same to completion by contract, or otherwise, and the Contractor shall be liable to the Forwarding Agent and/or the Purchaser for any excess costs necessarily incurred in good faith and occasioned thereby.

58. Wherever in this contract anything is to be done by the Contractor in accordance with his judgment or discretion, that judgment or discretion shall be exercised by the Contractor in good faith.

In Witness Whereof, the parties hereto have through their duly authorized representatives executed this contract this 2nd day of December, 1944.

Vanderburgh & Co., Inc., Forwarding Agent (a California corporation), by (S.) Lucas A. Powe, Vice President. Bigge Drayage Co., Contractor, by (S.) Henry W. Bigge, President.

[fol. 75] Approved: Empresa Siderurgica, S. A., Purchaser, by (S.) T. J. Tighe, Authorized Agent.

Accepted: Vanderburgh & Co., Inc., Fiscal Agent (a New York corporation), by (S.) T. J. Tighe, President.

[fol. 76] Supplement to Contract for Dismantling and Preparation for Shipment of Yosemite-Portland Cement Plant

Agreement made December 7th, 1944, between Vanderburgh & Co., Inc., a California corporation, having its principal office in San Francisco, California, acting as Forwarding Agent (hereinafter referred to as "Forwarding Agent") for Empresa Siderurgica, S. A., a corporation incorporated under the laws of the Republic of Colombia and having its principal office at Medellin, Republic of Colombia (hereinafter referred to as the "Purchaser"), and Bigge Drayage Co., a California corporation, having its principal office at Oakland, California, (hereinafter referred to as "Contractor"):

The parties hereto on the 2nd day of December, 1944, entered into the annexed contract for dismantling and preparation for shipment of the Yosemite-Portland cement plant located at Merced, California; and

The parties through a mutual mistake omitted to include therein one paragraph of said contract which had been agreed upon by them for inclusion therein.

In consideration of the premises, it is agreed that the following paragraph, numbered 59, shall be added to and become a part of said annexed contract and shall have the same force and effect as though it were originally written into said contract as executed, to-wit:

[fol. 77] 59. Any property, sales and/or transportation taxes, penalties and interest now or hereafter imposed upon or levied against the Contractor as a result of the dismantling and preparation for shipment of the Cement Plant, shall be for the Forwarding Agent's account, and the Fiscal Agent, on demand, shall reimburse Contractor for such taxes paid by Contractor, if Contractor gives notice to Fiscal Agent within ten (10) days after receipt of notice by Contractor from the taxing authority that such taxes are or will be assessed. Thereafter Forwarding Agent and/or Fiscal Agent shall have the right to institute and maintain in Contractor's name such litigation as Forwarding Agent may deem necessary or desirable to test the legality of the imposition or levy of any such taxes or penalties, said Agents agreeing hereby to indemnify Contractor and save it harmless from all liability, damage, cost and expense arising from or incident to any such litigation.

Contractor further agrees that it will not make any return or report for any such taxes or penalties without first discussing the return or report with the Fiscal Agent, or his designated representative, or attorneys, and shall furnish Fiscal Agent with a copy thereof coincidentally with such return or report being filed.

In the event Contractor does not give notice of the imposition, levy or assessment or any tax, or makes a return or report for any tax or penalty without first discussing the [fol. 78] return or report with the Fiscal Agent, or his designated representative, or attorneys, and or if Contractor does not furnish a copy thereof coincidentally with such return or report being filed as above provided, then such tax shall be paid by Contractor and Contractor shall not be entitled to reimbursement therefor by the Forwarding Agent, Fiscal Agent or Purchaser, or any of them.

In Witness Whereof, the parties hereto have through their duly authorized representatives executed this agreement this 7th day of December, 1944.

Vanderburgh & Co., Inc., Forwarding Agent (a California Corporation), by (S.) Lucas A. Powe, Vice President. Bigge Drayage Co., Contractor, by (S.) Henry W. Bigge, President.

Approved:

Empresa Siderurgica, S. A., Purchaser, by (S.) T. J. Tighe, Authorized Agent.

Accepted:

Vanderburgh & Co., Inc., Fiscal Agent (a New York Corporation), by (S.) T. J. Tighe, President.

[fol. 79] EXHIBIT No. 3

Interstate Commerce Commission

Evidence of Issue of Certificate of Public Convenience and Necessity. No. MC—43716

UNITED STATES OF AMERICA,
District of Columbia, ss:

It is Hereby Certified, that the Interstate Commerce Commission has found that Bigge Drayage Co., a corpora-

tion, Oakland, California, has duly complied with all applicable provisions of the Motor Carrier Act, 1935,* and the requirements, rules, and regulations prescribed thereunder, and, by appropriate order of this Commission, has been granted a certificate of public convenience and necessity, authorizing the said carrier to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges granted the said carrier.

This instrument is evidence of the authority of the holder of the certificate referred to herein to engage in transportation in interstate or foreign commerce in accordance with the provisions of the said certificate. Such certificate is effective from the date therein specified and will remain in effect until terminated as provided in the said act.

Witness the seal of the Interstate Commerce Commission and the hand of its Secretary, at Washington, D. C., this 28th day of January, A. D. 1943.

W. P. Bartel, Secretary. (Seal.)

[fol. 79a] Certificate of Public Convenience and Necessity

No. MC 43716**

Bigge Drayage Co., a Corporation, Oakland, California

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 28th day of January, A. D., 1943

After Due Investigation, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

It is ordered, That the said carrier be, and it is hereby,

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*Part II, Interstate Commerce Act.

**This certificate also embraces the operating rights purchased by the above-named carrier from Louis L. Fitinghoff, Docket Nos. MC 59160 and MC 59160 Sub. 1, pursuant to MC-F 1728, approved October 30, 1942.

granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicles subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

It is further ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

Irregular Routes:

Structural Iron and Steel, and *heavy machinery*,

Between points and places in Alameda and Contra Costa Counties, Calif.

Structural steel,

Between Oakland, Calif., and Sacramento, Calif.

Pipe and *pipe fittings*,

From Alameda, Oakland, and San Francisco, Calif., to points and places within 125 miles of Oakland, including Oakland, with no transportation for compensation on return, except as otherwise authorized.

Machinery, equipment, and *supplies* used or useful in logging, mining, road-building and construction work,

Between points and places in California except those in San Bernardino, Orange, Los Angeles, Riverside, San Diego, and Imperial Counties, Calif., on the one hand, and, on the other, points and places in Nevada.

Between points and places in California, except those in San Bernardino, Orange, Los Angeles, Riverside, San Diego, and Imperial Counties, Calif.

[fol. 79b] *Machinery, equipment*, and *supplies* used or useful in logging, mining, road-building, and construction work, in truckloads,

Between points and places in Idaho and Oregon.

Between points and places in Idaho and Oregon on the one hand, and, on the other, points and places in Nevada and California, except those in San Bernardino, Orange, Los Angeles, Riverside, San Diego, and Imperial Counties, Calif.

Any authority granted herein which is overlapping,

shall not be construed as granting duplicate operating rights.

It is further ordered, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

And it is further ordered, That this certificate shall supersede the certificate issued to the above-named carrier in this proceeding on May 26, 1942, and those issued to the predecessor in interest under Docket Nos. MC 59160 and MC 59160 Sub 1 on July 20, 1942 and July 17, 1940, respectively, which are hereby, canceled; the two latter certificates having been duly transferred to the above-named carrier as set forth in the footnote appended hereto.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 80] EXHIBIT "4"

Filed. In the Office of the Secretary of State of The State of California, Jan. 15, 1931. Frank C. Jordan, Secretary of State. By (Signed) Chas. J. Hagerty, Deputy.

Department of State Corporation Number 142909.

Articles of Incorporation of Bigge Drayage Co., Ltd.

Know All Men by These Presents:

That we, Henry Wilhelm Bigge, Bernice Mable Bigge, and Wilhelmina C. Bigge, a majority of whom are citizens and residents of the State of California, United States of America, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of California:

And do hereby certify:

First: That the name of the corporation is Bigge Drayage Co., Ltd.,

Second: That the objects and purposes for which this corporation is formed are the following:

To carry on a general trucking, hauling, transfer and express business, to purchase, lease, or otherwise acquire said business, and to do any and all acts incidental to, or connected therewith.

To transfer, haul, carry, and transport, goods, wares and merchandise, and other personal property of every [fol. 81] kind, nature and description from or to any point of places in the United States or elsewhere by means of electrical, steam, and gasoline cars and vehicles, trucks, trailers, automobiles, airplanes, horses, wagons, boats, or other means or methods of transportation; to contract or arrange with railroad companies, ferry companies, steamboat companies, or other carrier companies or individuals to transfer, haul, carry, or transport, such personal property for and on behalf of this corporation; and generally to do and transact a trucking, hauling and express business with all the rights, privileges, and powers necessary or desirable for the transaction of such business or incidental to the conduct of the same.

To carry on a general trucking, hauling, rigging, constructing and stevedore business, and to manufacture, acquire, deal in, advertise and dispose of trucks, trailers, automobiles, carriages, and other vehicles and kindred appliances; and to trade and deal in draft animals and apparatuses, and other things appertaining or belonging to said business.

To carry on the business of storing and warehousing, and all business necessary or impliedly incidental thereto; to further carry on the business of general warehousing in all its several branches, to construct, hire, purchase, operate, and maintain all and any conveyances for the transportation in storage or otherwise, by land or water of any and all [fol. 82] products, goods, manufactured articles and other personal property; to issue certificates and warrants, negotiable or otherwise, to persons warehousing goods with the Company; and to make all loans upon the security of such goods or otherwise; to manufacture, sell, and trade in all goods usually dealt in by warehouse men; to construct, purchase, take, lease, or otherwise acquire any wharf, pier, dock, or works, capable of being used in connection with the shipping, storage, transportation, and carrying on other business of the Company; and generally to carry on and

undertake any business, undertakings, transactions, or obligations commonly carried on or undertaken by warehouse men; and other business which may from time to time seem to the directors capable of being conveniently carried on in connection with the above or calculated, directly or indirectly, to enhance the value of, or render profitable, any of the Company's properties or rights.

To carry on a general excavating and constructing business and all business necessary or impliedly incidental thereto; to carry on said business in all its several branches, to construct, hire, purchase, operate, lease, maintain and manufacture any and all building materials, tools, machines, appliances, or other personal or real property pertaining or belonging to said business; and generally to carry on or undertake any business, undertakings, transactions or obligations commonly carried on or undertaken [fol. 83] in said business and to engage in any other business which may from time to time seem to the directors capable of being conveniently carried on in connection with the above or calculated, directly or indirectly, to enhance the value of, or render profitable, any of the Company's properties or rights.

To borrow and lend money, with or without security therefor; to make, endorse and issued promissory notes, bills of exchange, bonds, and indentures, and other evidences of indebtedness, to purchase, hypothecate, and encumber by mortgage, deed of trust or otherwise, all and any real or personal property; and to do and transact any and all business and exercise any and all powers necessary, proper, convenient, or incidental to the exercise and enjoyment of the foregoing powers.

The foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the general powers of the Company and the enjoyment thereof as now or hereafter conferred by the laws of the State of California upon corporations organized thereunder.

Third: The principle office for the transaction of business of the corporation will be located in the County of Alameda, State of California.

Fourth: The number of shares which may be issued by this corporation is One Hundred Thousand shares (100,000) of common stock without par value.

[fol. 84] Fifth: The total number of shares of common stock without par value which have been actually subscribed is Thirty shares (30) and the following are the names of the subscribers, the number of shares, respectively, for which they have subscribed and the amount to be paid by them, respectively, for such shares.

Name of Subscriber	No. of Shares Subscribed	Amount to be Paid
Henry Wilhelm Bigge	ten (10) shares	Ten Dollars ($10.00)
Bernice Mable Bigge	ten (10) shares	Ten Dollars ($10.00)
Wilhelmina C. Bigge	ten (10) shares	Ten Dollars ($10.00).

Sixth: The number of directors of this corporation is three; and the names and residences of the persons who are appointed to act until the first annual meeting of the share holders, or until the selection and qualification of their successors, are as follows:

Names	Place of Residence
Henry Wilhelm Bigge	Alameda, California
Wilhelmina C. Bigge	Alameda, California
Bernice Mable Bigge	Oakland, California

In witness whereof, we have hereunto set our hands this — day of December, 1930.

(Signed) Henry W. Bigge, Bernice Mabel Bigge, Wilhelmina C. Bigge.

[fol. 85] State of California,
County of Alameda, ss:

On this 29 day of December A. D. 1930, before me, E. H. Hart, a Notary Public in and for the County of Alameda, State of California, personally appeared Henry Wilhelm Bigge, Bernice Mable Bigge, and Wilhelmina C. Bigge, known to me to be the persons described in and whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

In witness whereof, I have set my hand and affixed my official seal the day and year in this certificate first above written.

(Signed) E. H. Hart, Notary Public in and for the County of Alameda, State of California. (Seal.)

[fol. 86] STATE OF CALIFORNIA

Department of State

PAUL PEEK, Secretary of State.

I, Paul Peek, Secretary of State of the State of California, do hereby certify:

That I have compared the annexed transcript with the record on file in my office, of which it purports to be a copy, and that the same is a correct transcript therefrom and of the whole thereof.

In witness whereof, I have hereunto set my hand and affixed the Great Seal of the State of California this 28th day of May, 1940.

(Signed) Paul Peek, Secretary of State. By (Signed) Chas. M. Hagerty, Deputy. (Seal.)

[fol. 87] Secretary of State of the State of California. May 20, 1940. Paul Peek, Sec'y of State, by Chas. J. Hagerty, Deputy.

Certificate of Amendment of Articles of Incorporation

Bigge Drayage Co., Ltd.

The undersigned, Henry Wilhelm Bigge, President, and Bernice Mabel Bigge, Secretary, do hereby certify that they are, respectively, and have been at all times herein mentioned, the duly elected and acting President and Secretary of Bigge Drayage Co., Ltd., a corporation duly organized and existing under and by virtue of the laws of the State of California, and further that

One: At a special meeting of the Board of Directors of said corporation duly held at its principal office for the transaction of business, at Oakland, California, at 11:00 o'clock, A.M., on the 29th day of April, 1940, at which meeting there were at all times present and acting a quorum of the members of said Board, the following resolutions were adopted:

Whereas, it is deemed by the Board of Directors of this corporation to be to the best interest of this corporation

that its Articles of Incorporation be amended as hereinafter set forth:

Now, therefore, be it resolved that Article First of the Articles of Incorporation of this corporation be amended [fol. 88] to read as follows:

'First: That the name of this corporation is, Bigge Drayage Co.'

And be it further resolved that Article Fourth of the Articles of Incorporation be amended to read as follows:

'Fourth: This corporation is authorized to issue two classes of shares of stock, to be designated, respectively, "Preferred" and "Common"; the total number of shares which this corporation shall have authority to issue is One Hundred Thousand Five Hundred (100,500), and the aggregate par value of all shares that are to have a par value shall be Fifty Thousand Dollars ($50,000.00), and

(a) The number of Preferred shares that are to have a par value shall be Five Hundred (500), and the par value of each share of such class shall be One Hundred Dollars ($100.00); and

(b) The number of Common shares that are to be without par value shall be One Hundred Thousand (100,000).'

And be it further resolved that the Articles of Incorporation of this corporation be amended by adding Article Seventh thereto, which said Article Seventh shall read as follows:

'Seventh: A statement of the preferences, privileges and restrictions granted to or imposed upon the respective classes of shares and/or upon the holders thereof is as follows:

[fol. 89] (a) The holders of Preferred shares shall be entitled to receive out of any funds of this corporation at the time legally available for the declaration of dividends, dividends at the rate of six per cent (6%) per annum of the par value thereof, payable in cash semi-annually, or at such time as the Board of Directors may from time to time determine, when and as declared by the Board of Directors. Such dividends shall accrue from the date of issuance of the respective Preferred shares and shall be deemed to accrue from day to day regardless of whether or not earned or

declared. Such dividends shall be payable before any dividends shall be declared or paid upon or set apart from the Common shares, and shall be cumulative, so that if in any year or years dividends upon the outstanding Preferred shares at the rate of six per cent (6%) per annum of the par value thereof shall not have been paid thereon or set apart therefor, the amount of the deficiency shall be fully paid or declared and set apart for payment, but without interest, before any distribution, whether by way of dividend or otherwise, shall be declared or paid upon, or set apart for, the Common shares.

(b) In the event of a voluntary liquidation, dissolution or winding up of this corporation, the holders of Preferred shares shall be entitled to receive out of the assets of this corporation, whether such assets are capital or surplus of any nature, an amount equal to One Hundred per cent [fol. 90] (100%) of the par value of such Preferred shares, and, in addition to such amount a further amount equal to the dividends unpaid and accumulated thereon, as provided in (a) of this Article Seventh, to the date of such distribution, whether earned or declared or not, and no more, before any payment shall be made or any assets distributed to the holders of Common shares.

In the event of an involuntary liquidation, dissolution or winding up of this corporation, the holders of the Preferred shares shall be entitled to receive out of the assets of this corporation, whether such assets are capital or surplus of any nature, an amount equal to One Hundred per cent (100%) of the par value of such Preferred shares and a further amount equal to the dividends unpaid and accumulated thereon as provided in (a) of this Article Seventh to the date of such distribution, whether earned or declared or not, and no more, before any payment shall be made or any assets distributed to the holders of Common shares.

If upon such liquidation, dissolution or winding up, whether voluntary or involuntary, the assets thus distributed among the holders of the Preferred shares shall be insufficient to permit the payment to such shareholders of the full preferential amounts aforesaid, then the entire assets of this corporation to be distributed shall be distributed ratably among the holders of Preferred shares. A [fol. 91] consolidation or merger of this corporation with or into any other corporation or corporations shall not be

deemed to be a liquidation, dissolution or winding up, within the meaning of this clause.

(c) In the event of any liquidation, dissolution or winding up of this corporation, whether voluntary or involuntary, subject to all of the preferential rights of the holders of Preferred shares on distribution or otherwise, the holders of Common shares shall be entitled to receive, ratably, all remaining assets of this corporation.

(d) This corporation, at the option of the Board of Directors, may redeem the whole, or from time to time may redeem any part of the Preferred shares on any dividend date, by paying therefor in cash One Hundred Two and 50/100 Dollars ($102.50) per share and, in addition to the aforementioned amount, an amount in cash equal to all dividends on the Preferred shares unpaid and accumulated, as provided in (a) of this Article Seventh, whether or not earned or declared, to and including the date fixed for redemption, such sum being hereinafter sometimes referred to as the redemption price. In case of the redemption of a part only of the outstanding preferred shares, this corporation shall designate by lot, in such manner as the Board of Directors may determine, the shares to be redeemed, or shall effect such redemption pro rata. At least sixty (60) days' previous notice by mail, postage prepaid, shall be [fol. 92] given to the holders of record of the Preferred shares to be redeemed, such notice to be addressed to each such shareholder at his postoffice address as shown by the records of this corporation, on or after the date fixed for redemption and stated in such notice, each holder of Preferred shares called for redemption shall surrender his certificate evidencing such shares to this corporation at the place designated in such notice and shall thereupon be entitled to receive payment of the redemption price. In case less than all of the shares represented by any such surrendered certificate are redeemed, a new certificate shall be issued representing the unredeemed shares. If such notice of redemption shall have been duly given, and if on or before the date fixed for redemption funds necessary for the redemption shall have been set aside so as to be and continue available therefor, then notwithstanding that the certificates evidencing any preferred shares so called for redemption shall not have been surrendered, the dividends

with respect to the shares so called for redemption shall cease to accrue after the date fixed for redemption, and all rights with respect to the shares so called for redemption shall forthwith after such date cease and terminate, except only the right of the holders to receive the redemption price without interest. At any time after giving notice of redemption as aforesaid, of all or any part of the Preferred shares, this corporation may deposit with a bank or trust company [fol. 93] in the City of Oakland, State of California, as a trust fund for the benefit of the holders of shares called for redemption, an amount in cash sufficient to pay the redemption price of such shares. After the making of such deposit, such shares shall not be deemed to be outstanding for any purpose, and the rights of the holders thereof shall be limited to the right to receive payment of the redemption price from such fund upon surrender of the certificates evidencing such shares. Subject to the provisions hereof, the Board of Directors shall have the authority to prescribe from time to time the manner in which preferred shares shall be redeemed.

(c) The holders of Preferred shares, at any date set for payment of dividends on such preferred shares, may convert the same into Common shares upon the basis of one (1) Common share for each Preferred share converted, upon surrender to the corporation of the certificates representing said Preferred shares, properly endorsed; and thereupon such holders shall be entitled upon such surrender to receive certificates representing one (1) Common share for each Preferred share so converted; provided, however, that in the event this corporation shall elect to redeem any of its outstanding Preferred shares, the time within which the holders of Preferred shares may convert the same into Common shares shall also be limited to the period prior to the date set for redemption, as hereinbefore provided in [fol. 94] (d) of this Article Seventh. Upon receipt of the surrendered certificates representing Preferred shares for conversion, this corporation shall issue, and the surrendering shareholder shall receive and accept, in lieu and conversion of such certificates, certificates for the number of Common shares to which he may be entitled by virtue of such conversion. Upon the surrender of any Preferred shares for conversion, the certificates for such Preferred shares

so surrendered shall be cancelled and the Preferred shares theretofore represented thereby shall never be reissued.

Of the authorized Common shares, an amount sufficient to provide for the conversion of the Preferred shares from time to time outstanding, as provided hereinabove, shall at all times be reserved for the purpose of effecting the conversion thereof. No issue of common shares or of preferred shares shall be made unless and until the amount of authorized unissued Common shares, after deducting therefrom the amount of Common shares proposed to be issued, shall at least equal the amount thereof required after such issue of Common shares or of Preferred shares to be reserved for the purpose of effecting the conversion of Preferred shares as hereinabove provided."

Two: That the number of shares of said corporation consenting to such amendment of its Articles of Incorporation is One Thousand, and the following is a copy of the form of Written Consent executed by the holders of said [fol. 95] shares:

"Written Consent of Shareholders to Amendment of Articles of Incorporation of Bigge Drayage Co., Ltd.

Whereas, at a special meeting of the Board of Directors of Bigge Drayage Co., Ltd., a California corporation, duly and regularly held at the principal office for the transaction of the business of said corporation, at Oakland, California, at 11:00 o'clock A.M., on the 29th day of April, 1940, pursuant to a written consent of all the Directors of said corporation, at which meeting a quorum of the members of said Board of Directors was at all times present and acting, amendments to said Articles of Incorporation of said corporation were adopted and approved by resolutions of said Board, amending Article First and Article Fourth, and by adding Article Seventh to said Articles of Incorporation of said corporation, to read as follows, respectively:

'First:—That the name of this corporation is Bigge Drayage Co.

'Fourth:—This corporation is authorized to issue two classes of shares of stock, to be designated, respectively, "preferred" and "Common"; the total number of shares which this corporation shall have authority to issue is One Hundred Thousand Five Hundred (100,500), and the aggre-

gate par value of all shares that are to have a par value [fol. 96] shall be Fifty Thousand Dollars ($50,000.00), and

(a) The number of Preferred shares that are to have a par value shall be Five Hundred (500), and the par value of each share of such class shall be One Hundred Dollars ($100.00); and

(b) The number of Common shares that are to be without par value shall be One Hundred Thousand (100,000).

Seventh:—A statement of the preferences, privileges and restrictions granted to or imposed upon the respective classes of shares and/or upon the holders thereof is as follows:

(a) The holders of Preferred shares shall be entitled to receive out of any funds of this corporation at the time legally available for the declaration of dividends, dividends at the rate of six per cent (6%) per annum of the par value thereof, payable in cash semi-annually, or at such time as the Board of Directors may from time to time determine, when and as declared by the Board of Directors. Such dividends shall accrue from the date of issuance of the respective Preferred shares and shall be deemed to accrue from day to day regardless of whether or not earned or declared. Such dividends shall be payable before any dividends shall be declared or paid upon or set apart for the Common shares, and shall be cumulative, so that if in any year or years dividends upon the outstanding Preferred shares at the rate of six per cent (6%) per annum [fol. 97] of the par value thereof shall not have been paid thereon or set apart therefor, the amount of the deficiency shall be fully paid or declared and set apart for payment, but without interest, before any distribution, whether by way of dividend or otherwise, shall be declared or paid upon or set apart for the Common shares.

(b) In the event of a voluntary liquidation, dissolution or winding up of this corporation, the holders of Preferred shares shall be entitled to receive out of the assets of this corporation, whether such assets are capital or surplus of any nature, an amount equal to One Hundred Per cent (100%) of the par value of such Preferred shares, and, in addition to such amount a further amount equal to the dividends unpaid and accumulated thereon, as provided in

(a) of this Article Seventh, to the date of such distribution, whether earned or declared or not, and no more, before any payment shall be made or any assets distributed to the holders of Common shares.

In the event of an involuntary liquidation, dissolution or winding up of this corporation, the holders of the Preferred shares shall be entitled to receive, out of the assets of this corporation, whether such assets are capital or surplus of any nature, an amount equal to One Hundred per cent (100%) of the par value of such Preferred shares and a further amount equal to the dividends unpaid and accumulated thereon as provided in (a) of this Article Seventh [fol. 98] to the date of such distribution, whether earned or declared or not, and no more, before any payment shall be made or any assets distributed to the holders of Common shares.

If upon such liquidation, dissolution or winding up, whether voluntary or involuntary, the assets thus distributed among the holders of the Preferred shares shall be insufficient to permit the payment to such shareholders of the full preferential amounts aforesaid, then the entire assets of this corporation to be distributed shall be distributed ratably among the holders of Preferred shares. A consolidation or merger of this corporation with or into any other corporation or corporations shall not be deemed to be a liquidation, dissolution or winding up, within the meaning of this clause.

(c) In the event of any liquidation, dissolution or winding up of this corporation, whether voluntary or involuntary, subject to all of the preferential rights of the holders of Preferred shares on distribution or otherwise, the holders of Common shares shall be entitled to receive, ratably, all remaining assets of this corporation.

(d) This corporation, at the option of the Board of Directors, may redeem the whole, or from time to time may redeem any part of the Preferred shares on any dividend date, by paying therefor in cash One Hundred Two and 50/100 Dollars ($102.50) per share and, in addition to the [fol. 99] aforementioned amount, an amount in cash equal to all dividends on the Preferred shares unpaid and accumulated, as provided in (a) of this Article Seventh, whether or not earned or declared, to and including the date fixed for redemption, such sum being hereinafter some-

times referred to as the redemption price. In case of the redemption of a part only of the outstanding preferred shares, this corporation shall designate by lot, in such manner as the Board of Directors may determine the shares to be redeemed, or shall effect such redemption pro rata. At least sixty (60) days' previous notice by mail, postage prepaid, shall be given to the holders of record of the Preferred shares to be redeemed, such notice to be addressed to each such shareholder at his postoffice address as shown by the records of this corporation. On or after the date fixed for redemptions and stated in such notice, each holder of Preferred shares called for redemption shall surrender his certificate evidencing such shares to this corporation at the place designated in such notice and shall thereupon be entitled to receive payment of the redemption price. In case less than all of the shares represented by any such surrendered certificate are redeemed, a new certificate shall be issued representing the unredeemed shares. If such notice of redemption shall have been duly given, and if on or before the date fixed for redemption funds necessary for the redemption shall have been set aside so as to be and [fol. 100] continue available therefor, then notwithstanding that the certificates evidencing any preferred shares so called for redemption shall not have been surrendered, the dividends with respect to the shares so called for redemption shall cease to accrue after the date fixed for redemption, and all rights with respect to the shares so called for redemption shall forthwith after such date cease and terminate, except only the right of the holders to receive the redemption price without interest. At any time after giving notice of redemption as aforesaid, of all or any part of the Preferred shares, this corporation may deposit with a bank or trust company in the City of Oakland, State of California, as a trust fund for the benefit of the holders of shares called for redemption, an amount in cash sufficient to pay the redemption price of such shares. After the making of such deposit, such shares shall not be deemed to be outstanding for any purpose, and the rights of the holders thereof shall be limited to the right to receive payment of the redemption price from such fund upon surrender of the certificates evidencing such shares. Subject to the provisions hereof, the Board of Directors shall have the authority to prescribe from time to time the manner in which preferred shares shall be redeemed.

(c) The holders of Preferred shares, at any date set for payment of dividends on such preferred shares, may [fol. 101], convert the same into Common shares upon the basis of one (1) Common share for each Preferred share converted, upon surrender to the corporation of the certificates representing said Preferred shares, properly endorsed; and thereupon such holders shall be entitled upon such surrender to receive certificates representing one (1) Common share for each Preferred share so converted; provided, however, that in the event this corporation shall elect to redeem any of its outstanding Preferred shares, the time within which the holders of Preferred shares may convert the same into Common shares shall also be limited to the period prior to the date set for redemption, as hereinbefore provided in (d) of this Article Seventh. Upon receipt of the surrendered certificates representing Preferred shares for conversion, this corporation shall issue, and the surrendering shareholder shall receive and accept, in lieu and conversion of such certificates, certificates for the number of Common shares to which he may be entitled by virtue of such conversion. Upon the surrender of any Preferred shares for conversion, the certificates for such Preferred shares so surrendered shall be cancelled and the Preferred shares theretofore represented thereby shall never be reissued.

Of the authorized Common shares, an amount sufficient to provide for the conversion of the Preferred shares from time to time outstanding, as provided hereinabove, shall at all times be reserved for the purpose of effecting the con- [fol. 102] version thereof. No issue of common shares or of preferred shares shall be made unless and until the amount of authorized unissued Common shares, after deducting therefrom the amount of Common shares proposed to be issued, shall at least equal the amount thereof required after such issue of Common shares or of Preferred shares to be reserved for the purpose of effecting the conversion of Preferred shares as hereinabove provided."

Now, therefore, each of the undersigned shareholders of said corporation does hereby adopt, approve and consent to the foregoing amendments to said Articles of Incorporation, and does hereby consent that said Articles of Incorporation be amended to read as herein set forth.

In witness whereof, each of the undersigned has hereunto

signed his name and, following his name, the date of signing and the number of votes which he is entitled to vote upon amendments of said Articles of Incorporation of the Character of the foregoing amendments.

Name	Date	Number of Votes

Three: That the total number of shares of said corporation entitled to vote on or consent to the adoption of such amendments is One Thousand (1,000);

In witness whereof, the undersigned have executed this Certificate of Amendment this 29th day of April, 1940.

[fol. 103] (signed) Henry W. Bigge, President of Bigge Drayage Co., Ltd.; (signed) Bernice M. Bigge, Secretary of Bigge Drayage Co., Ltd.

STATE OF CALIFORNIA,
County of Alameda, ss.

HENRY WILHELM BIGGE and BERNICE MABLE BIGGE, being first duly sworn each for himself/herself deposes and says; That Henry Wilhelm Bigge is, and was at all of the times mentioned in the foregoing Certificate of Amendment, the President of Bigge Drayage Co., Ltd., the California corporation therein referred to; and Bernice Mable Bigge is, and was at all of said times, the Secretary of said corporation; that each has read said Certificate and that the statements therein made are true of his/her own knowledge, and that the signatures purporting to be the signatures of said President and Secretary thereto are the genuine signatures of said President and Secretary, respectively.

Henry W. Bigge, Bernice M. Bigge.

Subscribed and sworn to before me this 29th day of April, 1940. A. S. Royster (signed), Notary Public in and for the County of Alameda, State of California. (Notarial Seal).

(P.63)

EXHIBIT NO. 5

Form FEA 419
Budget Bureau No. 41-R002.
Approval expires 6-30-44.

Foreign Economic Administration
FOREIGN ECONOMIC ADMINISTRATION—WAR PRODUCTION BOARD

FEA Block Control No.
(Not to be filled in by applicant)

APPLICATION FOR EXPORT LICENSE AND PRIORITY ASSISTANCE FOR ARTICLES AND MATERIALS (OTHER THAN ARMS, AMMUNITION, AND IMPLEMENTS OF WAR, TINPLATE SCRAP AND MERCURY)

License is hereby granted to the applicant named herein to export from the United States to the purchaser and consignee in the destination stated herein the articles and materials described, in the quantity given, for a consideration not in excess of that permissible by the Revised Maximum Export Price Regulation, as amended, issued by the Office of Price Administration. If the consideration is in excess of such maximum price, the issuance of this license shall not be construed as an approval of such price nor as relieving the applicant of liability for any violation of said Price Regulation. THIS LICENSE IS EXPRESSLY SUBJECT TO ALL RULES AND REGULATIONS ISSUED BY THE FOREIGN ECONOMIC ADMINISTRATION. Unless otherwise limited, it is valid for a period of ONE YEAR from the date of issuance. It is not transferable without official authority and is subject to revocation without notice.

IMPORTANT.—Applicant's signature required on DUPLICATE and QUADRUPLICATE (when used). See INSTRUCTIONS for filing in this form on the reverse side of ORIGINAL. If there is insufficient space for fully answering any question, supplemental explanation sheets should be attached to EACH copy of the application.

PB-1843 F

TO BE FILLED IN BY APPLICANT

1. Applicant (If applicant is agent, also give name of principal in 1 (b)):
(a) Name Henry J. Kaiser Company
Address Latham Square Bldg., Oakland Calif.
Citizenship

(b) Name
Address Same
Citizenship

2. Applicant's Ref. 11/11/44 Siderurgica

3. Country of Destination Colombia

4. Date of Application 11/13/44

5. Number of Import Recommendation, Selected Destination (Blanket) Control Permit, or Import License

6. Give name and address (street, city, state) of the following concerned with this shipment:

(a) Purchaser in foreign country:
Name Empresa Siderurgica, S.A.
Address Medellin, Colombia

Check, if for purchaser's own use ☐, or if for resale to (check one):
(b) ☐ Distributor/Wholesaler, ☐ Retailer, ☐ User.
Name
Address

(c) Consignee in foreign country (If same as purchaser, state "same")
Name Roldan & Cia
Address Buenaventura, Colombia

(d) Consignee in U. S. (If same as applicant or affiliate thereof, state "same")
Name Same
Address

7. (a) Item No.	(b) Quantity to be shipped (see instruction B4)	(c) (Do not fill in) Quantity approved (If different from 7 (b))	(d) Description of commodities in sufficient detail to permit accurate identification. Include applicant's purchase order description in full. Also show Schedule B No. and Processing Code	(e) CMP Code No. (If any)	(f) Total selling price and point of delivery, also unit value, if possible (see instruction B6) Unit value	Total price
			Articles and materials set forth on attached WPB 3649 which constitute the total known requirements for this cement manufacturing plant beginning January 1, 1945. The materials exported will be used only in accordance with the approval granted. All used second hand equipment			
			TOTAL PRICE			$555,000

VALIDATED
UNDER GENERAL PRIORITIES REGULATION

DEC 1 1944

By John H. Nelson

8. (a) Total weights (see instruction B6) Gross	Net	Cubic Meas.	(b) Date(s) on which it is necessary that Item(s) be ready for exportation: Item No.	Month	Day	Year	Item No.	Month	Day	Year	Item No.	Month	Day	Year
5647 tons	5347 tons	15,000 tons	1	During year		1945								

9. Describe in nontechnical terms item(s) on which priority assistance is requested. (Do not use trade name. Give approximate composition of alloys, if known.)

FOR OFFICIAL USE ONLY

FEA Case No. (License number when validated):

2086

DEC 14 1945

10. If a PREVIOUS application for this material has been submitted, give FEA CASE No. and WPB CASE No. (If any) and check reason for filing this application:

Previous FEA Case No.

Previous WPB Case No. (If any)

☐ Appeal for higher preference rating.
☐ Application returned for correction.
☐ Renewal of export license.
☐ Request for reconsideration of rating denial.
☐ Other reason (state reason).

NOT VALID WITHOUT OFFICIAL CERTIFICATION

Under authority of the War Production Board, delivery of the material referred to herein is assigned a preference rating of _____. Application and extension of rating shall be made in accordance with Priorities Regulation No. 3.

FOR OFFICIAL USE ONLY

1 ORIGINAL (License—when validated)

Identification Symbol

WPB Case No.

INSTRUCTIONS GOVERNING THE USE OF THE COMBINED APPLICATION FOR EXPORT LICENSE AND PRIORITY ASSISTANCE (FORM FEA 419)

A. GENERAL INSTRUCTIONS

1. Form FEA 419 is to be used when applying for a license to export commodities for which the Foreign Economic Administration has been given rating authority by the War Production Board,* or for which, in the past, a separate form WPB 541 (formerly PD-1A) was filed in addition to the form FEA 419. No form WPB 541 need be submitted with this application as the new form is a combination of form FEA 419 and form WPB 541. Additional copies of this form may be obtained from offices of the Foreign Economic Administration or field offices of the Department of Commerce. Applications on form FEA 419 should be submitted to the Foreign Economic Administration, Washington 25, D. C.

2. Applications may be made by a corporation, a partnership, an individual who is in fact the exporter, or a duly authorized agent. No application of any person not subject to the jurisdiction of the United States will be considered unless such applicant shows in detail that an unusual hardship would result from the refusal to consider such application. Any attempt to export commodities differing in any way from those licensed, or any alteration of a license, except by a duly authorized officer of the Government, is punishable under appropriate acts of Congress.

3. Licenses must be presented to the Collector of Customs at the port of exit or, in the case of shipments by mail, to the Postmaster at the point of mailing. In the case of shipments by water or air, the licenses must be presented prior to loading. In the case of shipments by means other than water, air, or mail, licenses must be presented to the Collector of Customs at the port of exit prior to inspection by the customs officials.

4. Applications on this form should be submitted in TRIPLICATE for those commodities for which the Foreign Economic Administration has been authorized to assign preference ratings, and in QUADRUPLICATE for those commodities which previously required the filing of form WPB 541. Applications should be typewritten, with the exception of the signature, but will be considered if written legibly in ink. The copy marked DUPLICATE (and the QUADRUPLICATE when used) must bear the signature of the applicant, or an officer or duly authorized agent of the applicant.

5. An application for an export license and priority assistance shall not be filed with the Foreign Economic Administration unless the applicant has a firm order from the purchaser named therein for the articles described in the amounts stated.

6. A license is valid for a period of 1 year from the date of issuance unless otherwise stated on the face of the license. If the license is revoked, or the period of validity expires, or shipment is for any reason not to be made, the license, if in the possession of the licensee, must be returned without delay to the Foreign Economic Administration.

7. The return post card which is furnished with each application must be filled in and submitted to the Foreign Economic Administration with the application. The application will be returned unless accompanied by the post card.

THIS SPACE TO BE FILLED IN BY APPLICANT

10. Send license to (type or print plainly):

NAME Henry J. Kaiser Company

STREET Care Ward, Kellogg & Simmons

CITY AND STATE 801 Tower Bldg., Washington, D.C.

B. SPECIAL INSTRUCTIONS

(Fill in answers to all applicable questions)

1. *Question 1.*—The applicant, if he is the agent of the exporter, must enter the name of his principal in part (b).

2. *Question 3.*—The country of ultimate destination is to be entered, not the country through which the exportation will travel in transit to a final destination.

3. *Question 6.*—The applicant shall enter in 6 (a), the name of the foreign customer who ordered the goods and to whom applicant is selling the goods. If the material ordered by the purchaser is for his own use, check the box provided. If the material will be resold by the purchaser, check in 6 (b) the applicable box, and give name and address of purchaser's customer. In 6 (c), there shall be entered the name of that person or firm at the port of entry who will receive the goods and through whom the goods will be transmitted to the purchaser. In answering 6 (d), there shall be entered the name of the person or firm who will clear the shipment through Customs, if other than the licensee or an affiliate of the licensee.

4. *Question 7 (a).*—When a group of related commodities is listed, it is necessary to give each commodity an item number under column (a) (for example, 1, 2, 3, etc.).

7 (b).—Give the quantity to be shipped using units specified in the *Comprehensive Export Schedule.*** When these units differ from those specified under CMP, show units in terms of CMP in parentheses (see *Products and Priorities***).

7 (c).—This column is not to be filled in by the applicant.

7 (d).—Description of the commodities must be given in sufficient detail to permit accurate identification. Give the full description of the material as shown in the applicant's purchase order to his supplier. Show the identifying Schedule B number to the right of each commodity described. Following the Schedule B number, insert the correct Processing Code in order to facilitate processing of the application (for example, 6046.00—SHIP).

7 (e).—The applicant should enter the CMP Code Number, if any. (Refer to *Products and Priorities.***) Applications may be returned if a CMP Code Number is not shown, if one has been designated for the commodity.

7 (f).—The applicant must show total price in the customary form of quotation, such as f. o. b. (factory); f. a. s. (named port), or other form used in the past. The particular form of price quotation must be specified. Unit value should be shown except where a large variety of products within a single Schedule B classification makes such a break-down extremely difficult. In such cases, only total price need be shown.

7 (g).—Total weights need be shown only for shipments to Selected Destinations, or for shipment made under the Program License of the Combined Agency for the Middle East Supply. The net weight must be shown in kilos for Selected Destinations only.

7 (h).—If the commodities listed under 7 (c) are to be exported in more than one shipment, enter applicable item numbers and dates on which it is necessary that commodities be ready for exportation.

5. *Question 14.*—The use intended for the material in this application will be an important factor in determining issuance of the license and the priority rating to be assigned. The applicant should indicate clearly in answering question 14, whether the material is to be used: (i) For resale in the open market or for conversion into goods to be so marketed, stating what will be produced or manufactured; (ii) for a service to be rendered, indicating how the item(s) described herein will be used in this service; (iii) for new construction or expansion; (iv) for maintenance, repair, or expansion of existing facilities; (v) for the national defense, public health, or safety of the country of destination; (vi) to enable the purchaser to produce and export needed materials to the United States or to one of the United Nations (vii) to be reexported and, if so, to what country, etc.

These instructions are subject to change. Changes will be announced in the *Comprehensive Export Schedule* and *Current Export Bulletins* issued by the Foreign Economic Administration, and in War Production Board releases.

For further information consult the *Comprehensive Export Schedule*, or the New York office of the Foreign Economic Administration, field offices of the Department of Commerce, or the Foreign Economic Administration or the War Production Board, Washington 25, D. C. Field offices of the War Production Board may also be consulted regarding questions on the form which also appear on Form WPB 541.

*Materials for which the Foreign Economic Administration has rating authority are listed in the *Comprehensive Export Schedule* and are announced from time to time in *Current Export Bulletins*.

***Products and Priorities* is a publication of the War Production Board containing information regarding CMP products. The *Comprehensive Export Schedule* is issued by the Foreign Economic Administration for the guidance of all concerned with Export Regulations and interpretations. Both publications may be obtained from the Superintendent of Documents, Government Printing Office, Washington 25, D. C., at a cost of 20 cents each.

FOR COLLECTORS OF CUSTOMS AND POSTMASTERS

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Collectors of Customs or Postmasters will endorse in the following spaces information concerning each shipment made under this license:

Quantity	Description	Value	Name of Vessel if Export is Made by Water	Port of Exit or Post Office of Mailing	Date	Customs Officer or Postmaster Signs and Affix Stamp, If Any

(P.65) Sheet 8 of 10

Form WPB-3540
10-1-43

UNITED STATES OF AMERICA
WAR PRODUCTION BOARD

R

APPLICATION FOR AUTHORITY TO ACQUIRE MATERIALS FOR FOREIGN PROJECTS

PROJECT NUMBER NO. 43-R5108
APPROVAL EXPIRES FEBRUARY 8, 1944

SERIAL NO.

To: Foreign Economic Administration, Washington 25, D.C.

DATE PROJECT AUTHORIZATION ISSUED

EXPIRATION DATE OF AUTHORIZATION

INSTRUCTIONS - Fill in Seven (7) copies of form and attachments. Retain one copy and send original and five copies to the above address.

PRIMARY DIVISION OR AGENCY

1. TAX AMORTIZATION REQUESTS FOR TAX AMORTIZATION PRIVILEGES WILL NOT BE CONSIDERED UNLESS FILED WITH THIS APPLICATION.
2. CHECK WHETHER THIS IS AN ORIGINAL APPLICATION FOR PRIORITIES ASSISTANCE OR AN AMENDMENT TO A PREVIOUS AUTHORIZATION. ORIGINAL AMENDED. IF AMENDMENT, GIVE: SERIAL NO._____ DATE OF ISSUANCE_____.

SPACE ABOVE FOR WPB USE ONLY

NAME OF COMPANY: Henry J. Kaiser Company

ADDRESS (Street, City, Zone, State): 1:10 16th Street, N. W. Washington, D. C.

LOCATION OF PROJECT: Boellin, Colombia, S. A.

SECTION II - BILL OF MATERIALS (See page 2 for Section I)

LINE NO. (a)	DESCRIPTION OF MATERIALS (List separately materials to be incorporated into project and those not to be incorporated) (b)	CMP CODE NO. (See Reverse of page 2) (c)	DEPARTMENT OF COMMERCE SCHEDULE "B" (d)	UNIT OF MEASURE (e)
	LIST I - MATERIALS TO BE INCORPORATED IN CONSTRUCTION			
23	Wire ropes	7bf	7:3900	Dollars
24	Rock drill bits and sharpener		7:3903	Dollars
25	Forge		7:3900	Dollars
26	Electric magnet - 115 volt		7:3900	Dollars
27	Concrete Mixers Locomotive portable, with motor, lever and measuring tank		7:1500	Dollars
28	Link belt navel complete with boom, buckets and 100 HP motor	71f	720100	Dollars
29	Bucyrus Erie Navel complete with boom, buckets, generator, control, etc.	71f	720100	Dollars
30	Plymouth 12-ton gasoline motored locomotive	750	714000	Dollars
31	Gasoline Engines	176	714400	Dollars
32	Boilers, stationary - 100 HP	158	714500	Dollars
33	D-7 Caterpillar tractor with angle dozer	71f	714500	Dollars
34	Part for heavy machinery		7:3900	Dollars
35	Horizontal feature ore reactor with filters, thickener, air tank, belting, etc.	178	770500	Dollars
36	Horizontal twin with flywheel, pulley and belt drive	178	770500	Dollars
37	Air Receivers	178	770500	Dollars
38	Tanks Gl wood & reinforced		4:3900	Dollars
39	Tanks, steel, 1-7½, 1-8½, 1-10½, 1-[illegible] gal. water tank, 1-6½		704300	Pounds
40	Motors, electric, 3 Ph. - 60 cyc. - 440 volts - 2-1/4 HP	401	704000	Number
41	Motors, electric, 3 Ph. - 60 cyc. - 440 volts - 1-1/2 HP	401	704000	Number
42	Motors, electric, 3 Ph. - 60 cycl-440 volts, 2-1HPs 2-2 HPs 4-3 HPs 5-5HPs 2-7-1/2 HPs 1-10 HPs 6-15 HPs 4-20 HPs 1-25 HPs 2-30 HPs 2-40 HPs 1-6 HPs 1-125 HPs 1-75	401	704:00	Number
43	Motor, electric, 3 Ph. - 60 cyc. - 440 volt. 1-:50 HP	401	704:00	Number
44	5-1/2 Kl. generator	401	70P715	Number
45	30 Kl Amps set with panels, switchgear, etc.	401	70:715	Number
46	1/2 Kl Generator with motor, switchboards etc	401	70:715	Number
47	Main distributing switchboards & panels meters, transformers, circuit breakers, bus bar connections, switches, line rack, conduits	410	70:150	Number
48	Control panel for motor fuses, switch boxes etc.	410	70:150	Number
	(PAGE WPB 668 6-17)			

VALIDATED
UNDER WPB REG. 3 AUTHORIZATION
DEC 1 '44
By John Nicholson

(IF ADDITIONAL SPACE IS REQUIRED USE ADDITIONAL SHEETS WITH SAME ARRANGEMENT)

SEE NEXT SHEET FOR REMAINING COLUMNS

CERTIFICATION ON REVERSE OF THIS PAGE MUST BE EXECUTED BY THE APPLICANT OR HIS AGENT BEFORE FORM IS FILED.

All used Hand Compressor

104d

PAGE 2

SECTION I

ESTIMATED COST (DO NOT INCLUDE COST OF EXISTING FACILITIES)

COST	FEDERAL FUNDS (U.S.) (a)	OTHER FUNDS (b)	TOTAL (c)
TOTAL COST			
COST EXCLUDING LAND			

PROPOSED CONSTRUCTION SCHEDULE

NUMBER OF DAYS BETWEEN DPD AUTHORIZATION AND:		NUMBER OF DAYS REQUIRED FOR:	
START OF CONSTRUCTION (a)	INITIAL EQUIPMENT INSTALLATION (b)	ACTUAL CONSTRUCTION (c)	EQUIPMENT INSTALLATION (d)

SECTION II - BILL OF MATERIALS

REPEAT LINE NO. (f)	TOTAL ANTICIPATED REQUIREMENTS FOR PROJECT (g)	MATERIAL REQUESTED BY THIS APPLICATION: NUMBER OF UNITS (h)	WEIGHT (i)	VALUE (U.S. Dollars) (j)	REQUIRED DELIVERY DATE (k)	ADJUSTED QUANTITIES (FOR DPD USE ONLY): NUMBER OF UNITS (l)	WEIGHT (m)	VALUE (U.S. Dollars) (n)
			Long Ton					
1		7	70	8871.00				
2		4	20	4268.00				
		1	1008	17:34.00				
4		8	15	1 :6.00				
		1	15	1491.00				
6		4	40)	2850.0				
7		8	1[illegible]	89 7.00				
8		[illegible]	20	13937.00				
9		10	[illegible]	[illegible]:0				
10		4	6	2[illegible]6.00				
11		1	[illegible]	1868.0	[illegible] 1 54			
14		14	1[illegible]	1[illegible] by				
17		[illegible]	0	16:01.00	Jotun [illegible]			
24		[illegible]	[illegible]50	20:39.00				
26		[illegible]	[illegible]0[illegible]	[illegible]:67.00				
28		2	20	[illegible]:29.00				
17		1	1[illegible]	167[illegible].00				
18		[illegible]	[illegible]0[illegible]	[illegible]780.50				
19		[illegible]	[illegible]0	[illegible]2.6.21				
20		19	[illegible]8	10847.50				
[illegible]		1	[illegible]0	[illegible]43.00				
[illegible]		1	150	[illegible]172.00				

VALIDATED

IF ADDITIONAL SPACE IS REQUIRED USE EXTRA SHEETS WITH SAME HEADINGS

CERTIFICATION ON REVERSE OF PAGE 1 MUST BE EXECUTED BY THE APPLICANT OR HIS AGENT BEFORE THE FORM IS FILED

104c

FORM WPB-3648 (10-7-43) R

UNITED STATES OF AMERICA
WAR PRODUCTION BOARD

BUDGET BUREAU NO. 12-R316.1
APPROVAL EXPIRES FEBRUARY 8, 1945

APPLICATION FOR AUTHORITY TO ACQUIRE MATERIALS FOR FOREIGN PROJECTS

SERIAL NO.

TO: Foreign Economic Administration, Washington 25, D.C.

DATE PROJECT AUTHORIZATION ISSUED | EXPIRATION DATE OF AUTHORIZATION

INSTRUCTIONS - Fill in seven (7) copies of form and attachments. Retain one copy and send original and five copies to the above address.

1. TAX AMORTIZATION REQUESTS FOR TAX AMORTIZATION PRIVILEGES WILL NOT BE CONSIDERED UNLESS FILED WITH THIS APPLICATION.
2. CHECK WHETHER THIS IS AN ORIGINAL APPLICATION FOR PRIORITIES ASSISTANCE OR AN AMENDMENT TO A PREVIOUS AUTHORIZATION. ORIGINAL AMENDED. IF AMENDMENT, GIVE: SERIAL NO. _____ DATE OF ISSUANCE _____

PRIMARY DIVISION OR AGENCY

SPACE ABOVE FOR WPB USE ONLY

NAME OF COMPANY	ADDRESS (Street, City, Zone, State)	LOCATION OF PROJECT
Henry J. Kaiser Company	1210 18th Street, N. W. Washington, D. C.	Medellin, Colombia, S.A.

SECTION II - BILL OF MATERIALS (See page 2 for Section I)

LINE NO. (a)	DESCRIPTION OF MATERIALS (List separately materials to be incorporated into project and those not to be incorporated) (b)	CMP CODE NO. (See Reverse of page 2) (c)	DEPARTMENT OF COMMERCE NUMBER SCHEDULE "B" (d)	UNIT OF MEASURE (e)
	LIST I - MATERIALS TO BE INCORPORATED IN CONSTRUCTION			
1	Belt Conveyors complete with drives & motors, controls, panels,	145	724900	Dollars
	etc. Total HP 40			
2	Bucket Elevators complete with motors. Total HP 40	145	724900	Dollars
3	Inclined Hoist complete with gears, brakes, rope, cars, 250 HP	145	724900	Dollars
	motor			
4	Screw Conveyors, complete with case, drive, and motors. Tot.HP 40	145	724900	Dollars
5	Fuller Kenyon complete with pump, gages, connection and motor	145	729100	Dollars
	Total HP 75			
6	A.C. Compeb Mills, complete with 500 HP motors. Total HP2000	144	732105	Dollars
7	Screens, various types, complete	144	732105	Dollars
8	Crushers complete with drives and motors. Total HP 55	144	732198	Dollars
9	Centrifugal pumps, oil pump, slurry pumps, etc. complete with	141	736999	Dollars
	motors.			
10	Stiff leg derrick complete with mast, boom, bullring, sheaves	146	731500	Dollars
	rope, blocks, etc.			
11	5 Drum hoist complete with motors. Total HP 60	146	731500	Dollars
12	Hoists, other, complete	146	731500	Dollars
13	Overhead cranes complete with tracks and motors. Total HP 195	146	731500	Dollars
14	Kilns, A.C. 10'x240' complete with rings, blocks, rollers, hoods,	144	733900	Dollars
	shafting, gearing, etc. and 500 HP motors, panels, switch gear,			
	etc. Total HP 1000 - 3 phase, 60 cycle, 440 volt.			
15	Kilns, oil fired treaters - 8'x100' complete with shafting, drive	144	733900	Dollars
	vent stacks, and 440 HP motors, panels, switch gears, etc.			
	Total HP 880 - 3 phase, 60 cycle, 440 volt.			
16	Burners for kilns, with piping, controls, etc.	588	733900	Dollars
17	Analyzers complete with instruments for kil	144	733900	Dollars
18	Kilns - complete	144	733900	Dollars
19	Dust Collectors complete	150	733900	Dollars
20	Feed tanks, Slurry tanks, and hoppers, etc.	588	733900	Dollars
21	Skimulter complete with motor, 60 HP - 3 phase, 60 cyc., 440 v.	144	733900	Dollars
22	Wash Mills complete with shafting, pillow blocks, discharge gates	144	733900	Dollars
	and drives			

VALIDATED
DEC 1 544
By

(FOR WPB USE ONLY)

(IF ADDITIONAL SPACE IS REQUIRED BOLD ADDITIONAL SHEETS WITH SAME HEADINGS)

SEE NEXT SHEET FOR REMAINING COLUMNS

CERTIFICATION ON REVERSE OF THIS PAGE MUST BE EXECUTED BY THE APPLICANT OR HIS AGENT BEFORE FORM IS FILED.

WPB - War Board 12-R316 p 2

104b

(P.68)

Sheet 1 of 10

SECTION I

ESTIMATED COST (DO NOT INCLUDE COST OF MISSING FACILITIES)

COST	FEDERAL FUNDS (U.S.) (a)	OTHER FUNDS (b)	TOTAL (c)
TOTAL COST			
COST EXCLUDING LAND			

PROPOSED CONSTRUCTION SCHEDULE

NUMBER OF DAYS BETWEEN DATE AUTHORIZATION NEED:		NUMBER OF DAYS REQUIRED FOR:	
START OF CONSTRUCTION (a)	INITIAL EQUIPMENT INSTALLATION (b)	ACTUAL CONSTRUCTION (c)	EQUIPMENT INSTALLATION (d)

SECTION II - BILL OF MATERIALS

CO-POST LINE NO. (a)	TOTAL ARTICLE-POUND EQUIVALENTS FOR PROJECT (b)	MATERIAL REQUESTED BY THIS APPLICATION: NUMBER OF UNITS (c)	WEIGHT (d)	VALUE (U.S. Dollars) (e)	REQUIRED DELIVERY DATE (f)	ADJUSTED QUANTITIES (FOR USE OF WSB ONLY): NUMBER OF UNITS (g)	WEIGHT (h)	VALUE (U.S. Dollars) (i)
23		10	20	72.00				
24		1	5	165.00				
25		1	2	25.00				
26		1	1	6.00				
27		1	2	858.10				
28		1	100	16585.00				
29		1	100	19059.29				
30		2	25	7655.00				
31		3	5	1555.50				
32		1	2	19.50				
33		1	5	909.00				
34		5207	50	28082.45				
35		VALIDATED		11700.50				
36		DEC 1 5 44	4	308.00				
37				500.00				
38		John H. Wilson	5	32.50				
39		5	40	1948.00				
40		2		6.18				
41		1		20.00				
42		42	60	1078.00				
43		1		1264.00				
44		1		25.00				
45		1		1558.00				
46		1	15	510.00				
47		1	5	858.00				
48		1	20	125.00				

IF ADDITIONAL SPACE IS REQUIRED USE SEPARATE SHEETS WITH SAME HEADING

CERTIFICATION ON REVERSE OF PAGE 1 MUST BE EXECUTED BY THE APPLICANT OR HIS AGENT BEFORE THE FORM IS FILED

[illegible]

1040

(P. 61)

Form WPB-3840
10-7-44

UNITED STATES OF AMERICA
WAR PRODUCTION BOARD

BUDGET BUREAU NO. 33-R016
APPROVAL EXPIRES FEBRUARY 1, 1945

R

APPLICATION FOR AUTHORITY TO ACQUIRE MATERIALS FOR FOREIGN PROJECTS

SERIAL NO.

TO: Foreign Economic Administration, Washington 25, D. C.

INSTRUCTIONS - Fill in seven (7) copies of form and attachments. Retain one copy and send original and five copies to the above address.

DATE PROJECT AUTHORIZATION ISSUED | EXPIRATION DATE OF AUTHORIZATION

1. TAX AMORTIZATION REQUESTS FOR TAX AMORTIZATION PRIVILEGES WILL NOT BE CONSIDERED UNLESS FILED WITH THIS APPLICATION.
2. CHECK WHETHER THIS IS AN ORIGINAL APPLICATION FOR PRIORITIES ASSISTANCE OR AN AMENDMENT TO A PREVIOUS AUTHORIZATION. ORIGINAL AMENDED. IF AMENDMENT, GIVE: SERIAL NO._____ DATE OF ISSUANCE_____

PRIMARY DIVISION OR AGENCY

SPACE ABOVE FOR WPB USE ONLY

NAME OF COMPANY

Henry J. Kaiser Company

ADDRESS (Street, City, Zone, State)

1210 18th Street, N.W.
Washington, D. C.

LOCATION OF PROJECT

Medellin
Colombia, South America

SECTION II - BILL OF MATERIALS (See page 2 for Section I)

LINE NO. (a)	DESCRIPTION OF MATERIALS (List separately materials to be incorporated into project and those not to be incorporated) (b)	CMP CODE NO. (See Reverse of page 2) (c)	DEPARTMENT OF COMMERCE NUMBER SCHEDULE "B" (d)	UNIT OF MEASURE (e)
	LIST 1 - MATERIALS TO BE INCORPORATED IN CONSTRUCTION			
49	Control panel for elevators, pumps, etc., complete	430	705198	Number
50	Steel safety cabinet control panels, complete	430	705198	Number
51	Accessories and parts for Motors, B.B.&		705598	Dollars
52	Switches, etc.		705800	Dollars
53	Other wiring supplies		705800	Dollars
54	Welding equipment and supplies	367	741585	Dollars
55	Transformers, 7-1/2 KVA, 1-25 KVA, 1-15 KVA, 1-3 1/2 KVA complete	465	705800	Number
56	Fixtures, Incandescent	436	709698	Dollars
57	Fixtures, Fluorescent	435	709681	Dollars
58	Engine lathes, 1-36" x 16', 1-16" x 8'	350	741005	Dollars
59	Drill with Accessories	350	741000	Dollars
60	Tool Box	350	741300	Dollars
61	Pipe threaders, Pipe Cutters, Grinders, etc.	350	741540	Dollars
62	Dowels and Accessories for machine tools		741990	Dollars
63	Hand Tools, miscellaneous	345	627090	Dollars
64	Roller Bearings and parts	305	749800	Dollars
65	Bolts, nuts, screws, rivets	314	697000	Lbs.
66	Structural Steps	312	699300	Lbs.
67	Pipe	312	699000	Lbs.
68	Pipe	312	699199	Lbs.
69	Galvanized Sheets	312	699300	Lbs.
70	Galvanizing Steel	312	699300	Lbs.
71	Buildings	312	699300	Lbs.
72	Piles	312	699300	Lbs.
73	Steel Joists		699300	Lbs.
74	Steel		699300	Lbs.
75	Steel		699300	Lbs.
76	Buildings		699300	Lbs.
77	Concrete		699300	Lbs.
78	Structural		699300	Lbs.
79	Steel		699300	Lbs.
	(FOR WPB USE ONLY)			

VALIDATED
DEC 1 1944
by John H Nelson

(IF ADDITIONAL SPACE IS REQUIRED ROLL ADDITIONAL SHEETS WITH SAME HEADINGS)

SEE NEXT SHEET FOR REMAINING COLUMNS

CERTIFICATION ON REVERSE OF THIS PAGE MUST BE EXECUTED BY THE APPLICANT OR HIS AGENT BEFORE FORM IS FILED.

All used hand compressors

(P. 70)

PAGE 2

SECTION I

ESTIMATED COST (DO NOT INCLUDE COST OF EXISTING FACILITIES)

COST	FEDERAL FUNDS (U.S.) (a)	OTHER FUNDS (b)	TOTAL (c)
TOTAL COST			
COST EXCLUDING LAND			

PROPOSED CONSTRUCTION SCHEDULE

NUMBER OF DAYS BETWEEN RFD AUTHORIZATION AND:		NUMBER OF DAYS REQUIRED FOR:	
START OF CONSTRUCTION (a)	INITIAL EQUIPMENT INSTALLATION (b)	ACTUAL CONSTRUCTION (c)	EQUIPMENT INSTALLATION (d)

SECTION II - BILL OF MATERIALS

REPEAT LINE NO. (f)	TOTAL ANTICIPATED REQUIREMENTS FOR PROJECT (g)	MATERIAL REQUESTED BY THIS APPLICATION: NUMBER OF UNITS (h)	WEIGHT (i)	VALUE (U.S. Dollars) (j)	REQUIRED DELIVERY DATE (k)	ADJUSTED QUANTITIES (FOR USE OF RFD): NUMBER OF UNITS (l)	WEIGHT (m)	VALUE (U.S. Dollars) (n)
49		1		121.50				
50		9		196.95				
51		2011	4	4080.51				
52		57	1	[illegible]				
53		8674	5	4080.66				
54	7	1804	3	1351.65				1
55		11	85	4482.50				
56		954		393.81				
57		17	1	41.70				
58		2	10	1334.50				
59		2	2	1949.00				
60		2	1	836.00				
61		10	3	2106.00				
62		8558	4	[illegible]				
63		111034	70	5135.97				
64		265	1	371.00				
65		31457	14	1264.93				
66		300	399	1537.56				
67		25587	6	336.07				
68		157730	75	250.98				
69		25695	39	[illegible]				
70		1674	2	46.99				
71		359		11.96				
72		1.00		36.77				
73		2000	1	250.40				
74		18		2.50				
75		3000	3.5	350.44				
76		27		9.34				
77		600	3.5	350.34				
78		2654		398.41				
79		20		3.40				

VALIDATED

Oct 1 54

IF ADDITIONAL SPACE IS REQUIRED USE EXTRA SHEETS WITH SAME HEADINGS

CERTIFICATION ON REVERSE OF PAGE 1 MUST BE EXECUTED BY THE APPLICANT OR HIS AGENT BEFORE THE FORM IS FILED

All used, except hand compressor

104g

71 Sheet 7 of 20

FORM WPB-3849
(8-7-44)

UNITED STATES OF AMERICA
WAR PRODUCTION BOARD

BUDGET BUREAU NO. 49-R3161
APPROVAL EXPIRES FEBRUARY 8, 1945

R

APPLICATION FOR AUTHORITY TO ACQUIRE MATERIALS FOR FOREIGN PROJECTS

SERIAL NO.

TO: Foreign Economic Administration, Washington 25, D.C.

DATE PROJECT AUTHORIZATION ISSUED

EXPIRATION DATE OF AUTHORIZATION

INSTRUCTIONS - Fill in *seven (7) copies* of form and attachments. Retain one copy and send *original* and *five copies* to the above address.

1. TAX AMORTIZATION REQUESTS FOR TAX AMORTIZATION PRIVILEGES WILL NOT BE CONSIDERED UNLESS FILED WITH THIS APPLICATION.
2. CHECK WHETHER THIS IS AN ORIGINAL APPLICATION FOR PRIORITIES ASSISTANCE OR AN AMENDMENT TO A PREVIOUS AUTHORIZATION. ORIGINAL AMENDED. IF AMENDMENT, GIVE: SERIAL NO. _____ DATE OF ISSUANCE _____

PRIMARY DIVISION OR AGENCY

SPACE ABOVE FOR WPB USE ONLY

NAME OF COMPANY

[illegible] Palmer [illegible] Corp

ADDRESS (Street, City, Zone, State)

[illegible] 10 [illegible] 17th Street, [illegible]
[illegible] Washington, [illegible] D.C.

LOCATION OF PROJECT

[illegible]
[illegible] Colombia, South America

SECTION II - BILL OF MATERIALS (See page 2 for Section I)

LINE NO. (a)	DESCRIPTION OF MATERIALS (List separately materials to be incorporated into project and those not to be incorporated) (b)	CMP CODE NO. (See Reverse of page 2) (c)	DEPARTMENT OF COMMERCE NUMBER SCHEDULE "B" (d)	UNIT OF MEASURE (e)
	LIST 1 - MATERIALS TO BE INCORPORATED IN CONSTRUCTION			
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]		[illegible]	[illegible]
[illegible]	[illegible]		[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]		[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]		[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]		[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]		[illegible]	[illegible]
[illegible]	[illegible]	[illegible]

PAGE 2

SECTION I

ESTIMATED COST (DO NOT INCLUDE COST OF ASSISTIVE FACILITIES)

COST	FEDERAL FUNDS (U.S.) (a)	OTHER FUNDS (b)	TOTAL (c)
TOTAL COST			
COST EXCLUDING LAND			

PROPOSED CONSTRUCTION SCHEDULE

NUMBER OF DAYS BEFORE UPO AUTHORIZATION AND:		NUMBER OF DAYS REQUIRED FOR:	
START OF CONSTRUCTION (a)	INITIAL EQUIPMENT INSTALLA[redacted] (b)	ACTUAL CONSTRUCTION (c)	EQUIPMENT INSTALLATION (d)

[redacted] II - BILL OF MATERIALS

REPEAT LINE NO. (f)	TOTAL ANTICIPATED REQUIREMENTS FOR PROJECT (g)	MATERIAL REQUESTED BY THIS APPLICATION: NUMBER OF UNITS (h)	WEIGHT (i)	VALUE (U.S. Dollars) (j)	REQUIRED DELIVERY DATE (k)	ADJUSTED QUANTITIES (FOR UPO USE ONLY): NUMBER OF UNITS (l)	WEIGHT (m)	VALUE (U.S. Dollars) (n)
80		105		5.22				
81		49	1.2	58.53				
82		56		213.93				
83		7		57.56				
84		500		102.52				
85		5		9.34				
86		10		24.85				
87		17786	8	3284.80				
88		75	75	5206.67				
89		1946.58	15	1946.58				
90		14000	4	649.38				
91		439.99	5	439.99				
92		5514.16	2	5514.16				
93		7.3/2		7.38				
94		1		1.14				
95		21		1.68				
96		1		.10				
97		750		283.35				
98		5		14.95				
99		20		1.68				
100		89		[illegible]				
101		5		75.85				
102		173	1	17.38				
103		210		24.36				
104		12		30.43				
105		2		3.08				
106		6		9.57				
107		5		.45				
108		75		.85				
109		2	5	5.10				
110		1		.15				

IF ADDITIONAL SPACE IS REQUIRED USE EXTRA SHEETS WITH SAME HEADINGS.

CERTIFICATION ON REVERSE OF PAGE 1 MUST BE EXECUTED BY THE APPLICANT OR HIS AGENT BEFORE THIS FORM IS FILED

VALIDATED

104i

Form WPB-3649
10-7-941

UNITED STATES OF AMERICA
WAR PRODUCTION BOARD

BUDGET BUREAU NO. 13-R010
APPROVAL EXPIRES FEBRUARY 8, 1943

R

APPLICATION FOR AUTHORITY TO ACQUIRE MATERIALS FOR FOREIGN PROJECTS

SERIAL NO.

TO: Foreign Economic Administration, Washington 25, D.C.

DATE PROJECT AUTHORIZATION ISSUED | EXPIRATION DATE OF AUTHORIZATION

INSTRUCTIONS - File in seven (7) copies of form and attachments. Retain one copy and send original and five copies to the above address.

PRIMARY DIVISION OR AGENCY

1. TAX AMORTIZATION REQUESTS FOR TAX AMORTIZATION PRIVILEGES WILL NOT BE CONSIDERED UNLESS FILED WITH THIS APPLICATION.
2. CHECK WHETHER THIS IS AN ORIGINAL APPLICATION FOR PRIORITIES ASSISTANCE OR AN AMENDMENT TO A PREVIOUS AUTHORIZATION. ORIGINAL AMENDED. IF AMENDMENT, GIVE: SERIAL NO. DATE OF ISSUANCE.

SPACE ABOVE FOR WPB USE ONLY

NAME OF COMPANY

Henry J. Kaiser Company

ADDRESS (Street, City, Zone, State)

1710 18th Street, N.W.
Washington, D. C.

LOCATION OF PROJECT

Natal, Brazil
Natalia, South America

SECTION II - BILL OF MATERIALS (See page 3 for Section I)

LINE NO. (a)	DESCRIPTION OF MATERIALS (List separately materials to be incorporated into project and those not to be incorporated) (b)	CMP CODE NO. (See Reverse of page 3) (c)	DEPARTMENT OF COMMERCE NUMBER SCHEDULE "B" (d)	UNIT OF MEASURE (e)
	LIST I - MATERIALS TO BE INCORPORATED IN CONSTRUCTION			
111	Valves	881	774090	No.
112	Valves - [illegible]	881	846403	No.
113	Labor-Copy Equipment	806	719090	No.
114	Lumber		614000	M. f. b.
115	Railroad Ties		607900	M. f. b.
116	Poles Pail		606300	M. Tons
117	Pail Joints		606600	Do.
118	Brick Bolts	714	606800	Do.
119	Refractory Brick	928	536800	No.
120	Refractory Cement		537090	Do.
121	Packing		369990	Lbs.
122	Gather Belting		069900	Do.
123	Rubber Belting		214000	Lbs.
124	Furniture		27300	Do.
125	Magnesium Chloride		099090	Do.
126	Calcium Chloride		054300	Lbs.
127	Oil Tubes	886	660035	Lbs.
128	Linoleum & Gloves		097200	Pr.
129	Chairs		930970	No.
130	Friction Tape		209600	Do.
131	Emery Cloth		841800	Pc.
132	Miscellaneous Operating Supplies			

VALIDATED
Pursuant to M. Administration
WPC 1544
By John H. Nelson

(FOR WPB USE ONLY)

(IF ADDITIONAL SPACE IS REQUIRED USE ADDITIONAL SHEETS WITH SAME HEADINGS)

SEE NEXT SHEET FOR REMAINING COLUMNS

CERTIFICATION ON REVERSE OF THIS PAGE MUST BE EXECUTED BY THE APPLICANT OR HIS AGENT BEFORE FORM IS FILED.

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PAGE 2

SECTION I

ESTIMATED COST (DO NOT INCLUDE COST OF EXISTING FACILITIES)

COST	FEDERAL FUNDS (U.S.) (a)	OTHER FUNDS (b)	TOTAL (c)
TOTAL COST			
COST EXCLUDING LAND			

PROPOSED CONSTRUCTION SCHEDULE

NUMBER OF DAYS BETWEEN NPS AUTHORIZATION AND:		NUMBER OF DAYS REQUIRED FOR:	
START OF CONSTRUCTION (g)	INITIAL EQUIPMENT INSTALLATION (h)	ACTUAL CONSTRUCTION (i)	EQUIPMENT INSTALLATION (j)

SECTION II - BILL OF MATERIALS

REPEAT LINE NO. (f)	TOTAL ANTICIPATED REQUIREMENTS FOR PROJECT (g)	MATERIAL REQUESTED BY THIS APPLICATION: NUMBER OF UNITS (h)	WEIGHT (i)	VALUE (U.S. Dollars) (j)	REQUIRED DELIVERY DATE (k)	ADJUSTED QUANTITIES (FOR NPS USE ONLY): NUMBER OF UNITS (l)	WEIGHT (m)	VALUE (U.S. Dollars) (n)
111		408	5	$201.00				
112		424	1	$24.27				
113		510	1	$300.00				
114		326.328)		$547.47				
115		72.100)	300	$84.39				
116		[illegible]	255	$107.85				
117		[illegible]	15.3	$26.65				
118		16480	25.2	1218.28				
119		[illegible]	111.6	7488.88				
120		480	.8	15.85				
121		455	.8	117.80				
122		160		268.70				
123		1080		646.16				
124			5	300.00				
125		500		0.00				
126		200		4.27				
127		16000	8.25	420.00				
128	VALIDATED			9.54				
129				17.65				
130	DEC 1 544	16		11.05				
131	37 John H Wilson			8.58				
132			40 37.5	1701.00				
		TOTALS	5847	555,000.00				

IF ADDITIONAL SPACE IS REQUIRED USE EXTRA SHEETS WITH SAME HEADINGS

CERTIFICATION ON REVERSE OF PAGE 1 MUST BE EXECUTED BY THE APPLICANT OR HIS AGENT BEFORE THE FORM IS FILED

(NPS) WEP/MAINTENANCE P. 1 (10-67)

We need second blank application

104k

FORM WPB-3649 10-1-001

INSTRUCTIONS FOR FORM WPB-3649

These instructions cover the use of Form WPB-3649 as an application for priorities assistance involving construction and materials of all foreign projects except foreign petroleum projects which use Form WPB-3649.1. Form WPB-3649.1 is an adaptation of this form.

I. General Instructions

A. *Filing Instructions.* Fill in this form in 7 copies. Retain one copy and send the original and 5 copies together with supporting attachments in the same number of copies to the Foreign Economic Administration, Washington 25, D. C.

The applicant must be the person (operator) who is, or is to be the owner of the proposed structure or equipment, or his authorized representative. One of them must sign and date all copies of the application. The name and address of the applicant must be identical with that appearing on the application for export license.

B. *Procedure if Preference Rating or a Controlled Materials Allotment Authorization is Granted.* If the application is approved, preference ratings will be assigned where required and any controlled materials required will be allotted. One copy of this application will be returned to the applicant, containing therein or in an accompanying form or letter, the ratings and quantities or values of materials authorized.

C. *Special Items.* Many items to be used or bought are subject to WPB "S", "L", "M", "P", or "U" orders which require special forms. These special forms should be submitted with the application.

D. *Procedures to Follow to Obtain Amendment to Approved Authorizations.*

Submit a letter (in duplicate) for the following: (Give serial number and date of issuance if approved authorization on W. P. B. 3649.)

1. *Higher ratings.* Give purchase order number, description of item, name and address of supplier, his promised delivery date with present rating, and delivery date.

2. A request for permission to waive certain restrictions placed upon the applicant in previous authorizations, explaining in detail why the waiver is necessary.

3. *Time extension.* Explain fully why time extension is needed.

For additional facilities, machinery or equipment file W. P. B. 3649 and in item 2 give serial number and date of issuance of original authorization. Answer all applicable questions, confining answers to additional facilities only.

II. Special Instructions

A. Fill in the required information on the appropriate and in Section I the information required on the Estimated Cost and Proposed Schedule.

B. Method of entering Requirements of Materials and Equipment in Section II.

1. Enter all controlled materials, whether to be used as such or in the fabrication of Class A products, but do not enter fabricated Class A products as such. Also enter all other items to be used which are listed in the Materials and Equipment List on the reverse of page 3 of this form since no such item may be used unless so entered.

Class A products are all fabricated items which are not covered by the Materials and Equipment List in this form or by the "Products and Priorities" booklet referred to on that list. Do not enter, in addition to the items of equipment or machinery, the materials incorporated therein nor the manufactured components of such equipment items.

2. Enter first materials to be permanently and physically incorporated in the project, or wholly consumed in the course of construction. Make a separate listing of any required materials incidental to the construction but not to be incorporated therein (e. g. construction machinery and hand tools).

3. Column (b) must be a comprehensive description of material and equipment including, when pertinent, size, capacity, make and model number. Wherever possible, the material breakdown set forth in the current comprehensive Export Control Schedule of the Foreign Economic Administration should be followed in entering the items. The order in which the items should be listed is governed by the Item Number of the material and equipment as shown in the list on page 4. The lowest item numbers are entered first. Specify if new or second hand.

4. In column (c) the applicant should enter the CMP Code Number, if any, of the respective item, as shown in the Materials and Equipment List given on page 4.

5. The unit of measure entered in column (e) should be the same as that used for CMP products and other items listed in the Bill of Materials on page 4.

6. Column (g)—Enter in this column the total anticipated quantity of each item of material required to construct the project which must be imported from the United States (including both material in the applicant's possession or under his control, and material to be obtained.)

7. Column (j)—"Value U. S. Dollars" is the value of the purchase in U. S. dollars excluding installation cost. The dollar value shall be expressed in terms of F. O. B. factory selling price except that F. A. S. seaboard selling price may be used where only such price is available. On any items on which the basis for valuation is F. A. S. seaboard selling price, this shall be designated by inserting "F. A. S." above the entry in the appropriate column.

8. Column (k)—"Required delivery date" means date of delivery from manufacturer or vendor. This should be realistically considered in relation to the construction schedule, shipping time, etc. Material which is on hand should be so indicated.

9. The other columns are self explanatory.

III. Justification of Project

Attach separate letter size sheets of paper and give in the same order answers to questions as they appear below:

A. Describe the principal services to be rendered or product to be manufactured or produced; include the following:

(1) Brief description of the manufacturing process involved or services to be rendered.

(a) Explain in detail if manufacturing, and the process is new or experimental.

(2) Explain in detail the immediate need for the product or service giving:

(a) The relationship to the war effort, essential civilian needs, or public health and safety.

(b) Specific reasons why the project cannot be deferred for the duration of the war.

B. Have you made any other application or proposal related to this project or any part thereof? If so, state:

(1) Agency and address to which application or proposal was submitted and date.

(2) Action taken and date.

C. Describe the proposed project in detail, giving the following information:

(1) Whether it is a new independent project or an alteration or addition to an existing structure or installation.

(2) A clear, concise description of the construction involved including: (Submit general plans if available or show by sketches, plan and section. (Indicate dimensions.)

(a) General layout (Project limits and relation of structure.)

(b) Description of structures, installations or other construction.

(c) Type of construction (Masonry, reinforced concrete, steel, timber, etc.)

REMARKS

There exists at the present time a great shortage of cement in Colombia which is causing great difficulty in essential highway, industrial and other building construction work. Empresa Siderurgica, S. A. is the owner of large limestone deposits near Medellin, Colombia, and with this equipment can supply cement needed to sustain the national economy of Colombia and give employment there.

Further justification of project as requested in Paragraph III of Instructions is as follows:

A. (1) See explanation above
(a) Established process
(2-A) Essential to war effort and civilian economy of Colombia
(b) Because there is a shortage of cement manufacturing facilities in Colombia

C. (1) A new independent project
(2) Plant has been disassembled in the United States and will be reassembled in Colombia.

CERTIFICATION - THE UNDERSIGNED HEREBY CERTIFIES TO THE WAR PRODUCTION BOARD WITH RESPECT TO THIS APPLICATION CONSISTING OF 15 PAGES THAT:

(1) THE FACTS STATED IN THIS APPLICATION ARE, TO THE BEST OF HIS KNOWLEDGE AND BELIEF, TRUE AND CORRECT.

(2) MATERIAL SECURED AS A RESULT OF THIS APPLICATION WILL BE USED FOR THE OPERATIONS SPECIFIED HEREIN, OR TO REPLACE IN INVENTORY MATERIAL SO USED.

Henry J. Kaiser Company
NAME OF COMPANY

December 5, 1944
DATE

BY [signature]
SIGNATURE OF AUTHORIZED OFFICIAL

Washington Representative
TITLE

SECTION 35(A) OF THE UNITED STATES CRIMINAL CODE, 18 U.S.C. SEC. 80, MAKES IT A CRIMINAL OFFENSE TO MAKE A WILLFULLY FALSE STATEMENT OR REPRESENTATION TO ANY DEPARTMENT OR AGENCY OF THE UNITED STATES AS TO ANY MATTER WITHIN ITS JURISDICTION.

(WPB) War Board 1225[illegible] p. 3 (Rev.)

[fol. 110] EXHIBIT "7"

Forwarding Agents, Exporters and Importers.

Telephone: YUkon 2256.

Vanderburgh & Co., Inc.

(A California Corporation)

220 Montgomery Street

San Francisco 4, California

January 3, 1945.

Bigge Drayage Company, 24th and Campbell Streets, Oakland, California.

GENTLEMEN:

In accordance with Paragraph 10 C of our Contract with you dated December 2, 1944, you are hereby notified that on this date purchaser acquired title and we took delivery of the Cement Plant, and the undersigned as Forwarding Agent has the right to possession.

Very truly yours, Vanderburgh & Co., Inc., by (S.) Lucas A. Powe, Vice President.

This Notice Approved: Henry J. Kaiser Company, by (S.) E. E. Trefethen, Jr., Vice President; Henry J. Kaiser Company.

[fol. 111] EXHIBIT No. 8

Corporation Power of Attorney

Know All Men by These Presents, That Henry J. Kaiser Company, a corporation doing business under the laws of the State of Nevada, and having an office and place of business at 1522 Latham Square Building, Oakland, California, hereby constitutes and appoints Vanderburgh & Co., Inc., a California corporation, as a true and lawful agent and attorney of the grantor named above for and in the name, place, and stead of said grantor from this date and in Customs District No. 28, and in no other name, to make, endorse, sign, declare, or swear to any declaration,

certificate, bill of lading, or other endorsement required by law or regulation in connection with the transportation or exportation of any merchandise shipped or consigned by said grantor in connection with Export License SP No. 2086, validated by the Foreign Economic Administration December 15, 1944, and/or any amendment or supplement thereto; to perform any act or condition which may be required by law or regulations in connection with such merchandise; giving to said agent and attorney full power and authority to do anything whatever requisite and necessary to be done in the premises as fully as said grantor could do if present and acting, hereby ratifying and confirming all that the said agent and attorney shall lawfully do by virtue of these presents; the foregoing power of attorney to remain in full force and effect until the 31st day of December, 1945, or until notice of revocation in writing is duly given to and received by the Collector of Customs of the district aforesaid.

[fol. 111a] In Witness Whereof, the said corporation has caused these presents to be sealed and signed by its Secretary, City of Oakland, State of California, this 18th day of January, 1945.

Henry J. Kaiser Company, by G. G. Sherwood, Its Secretary.

STATE OF CALIFORNIA,
County of Alameda,
City of Oakland, ss:

On this 20th day of January, 1945, personally appeared before me G. G. Sherwood, residing at Oakland, California, to me known, who, being by me duly sworn, deposes and says that he is the secretary of Henry J. Kaiser Company, the corporation described in the foregoing instrument; that the seal affixed to said instrument is the corporate seal thereof and was affixed thereto by order of the Board of Directors of said company; that he by like authority subscribed the corporate name to said instrument and signed his own name thereto.

Nellie I. Phillips, Notary Public in and for the County of Alameda, State of California.

[fol. 105] EXHIBIT "6"

J. Henry Schroder Banking Corporation,
46 William Street,
New York

Cable Address "Schrobanco"
Via Airmail

Commercial Credits

January 3, 1945.

Messrs. Henry J. Kaiser Company, Oakland, California.

Irrevocable Letter of Credit No. A-19274/3439

All Drafts Drawn Must Be Marked: "Drawn as Per Letter of Credit A-19274/3439

We have opened our irrevocable letter of credit in your favor for the account of Banco de Bogota, Medellin, Colombia, on behalf of Empresa Siderurgica, S. A., Medellin, for a sum or sums not exceeding a total of $505,000.00 (Five Hundred Five Thousand U. S. Dollars).

The terms of the letter of credit provide that presentation of the following documents be made to the Bank of America, N. T. & S. A., San Francisco, Calif., not later than June 20, 1945:

1. Photostatic copy or certified copy of an export permit or license permitting the export of a cement plant to the Republic of Colombia.

2. Certificate, executed by you, stating that said permit or license covers the cement plant sold to buyer.

Thereafter this credit is available by your sight drafts drawn on the Bank of America, N. T. A. & S. A., San Francisco, Calif., as follows:

[fol. 106] a) For the sum of One Hundred Twenty-Six Thousand Two Hundred Fifty Dollars ($126,250.00) forty five days after date said copy of the export permit or license is presented.

b) For the sum of One Hundred Twenty-Six Thousand Two Hundred Fifty Dollars ($126,250.00) ninety (90) days after date said copy of the export permit or license is presented.

c) For the sum of One Hundred Twenty-Six Thousand Two Hundred Fifty Dollars ($126,250.00) one hundred thirty-five (135) days after date said copy of the export permit or license is presented.

d) For the sum of One Hundred Twenty-Six Thousand Two Hundred Fifty Dollars ($126,250.00) one hundred eighty (180) days after date said copy of the export permit or license is presented.

In the event shipment of the entire plant from Merced shall be completed prior to the time or times above specified, the purchasers shall deliver to you a certificate stating that such removal has been completed and upon the presentation of said certificate to the Bank of America, N. T. & S. A., San Francisco, Calif., any balance of the purchase price then payable shall be paid to you forthwith.

All drafts drawn under this credit must be endorsed on the reverse hereof and the credit itself must accompany the draft which exhausts the credit and must be surrendered [fol. 107] concurrently with the presentation of such draft.

J. Henry Schroder Banking Corporation. Authorized Signature ——— ———. Authorized Signature ——— ———.

The J. Henry Schroder Banking Corporation hereby undertakes that all drafts drawn in compliance with the terms of this credit shall be duly honored on presentation if presented not later than 180 days after presentation to the Bank of America, N. T. & S. A., San Francisco, of the above mentioned documents.

Very truly yours, J. Henry Schroder Banking Corporation. Authorized Signature ——— ———. Authorized Signature ——— ———.

[fol. 108] J. Henry Schroder Banking Corporation

46 William Street

New York 5, N. Y.

Cable address "Schrobanco"

Commercial Credits

Via Air Mail. January 12, 1945.

Messrs. Henry J. Kaiser Company, Oakland, California.

Re: L/C No. A19274/3439 Opened in Your Favor, on Behalf of Empresa Siderurgica, S. A., Medellin, Colombia, for Account of Banco de Bogota, Medellin, Colombia

Dear Sirs:

Please note that in accordance with instructions which we have received from our principals, we have amended the above mentioned Letter of Credit as follows:

The words, "not later than June 20,'1945" appearing in the second paragraph, have been deleted.

The words, "is presented" appearing in subsections (a) (b) (c) and (d) of the second paragraph, have been deleted and substituted by the words, "has been presented."

* * * * * * *

This amendment forms an integral part of said Letter of Credit which remains unchanged with regard to all other [fol. 109] terms and conditions.

Very truly yours, J. Henry Schroder Banking Corporation. Authorized Signature ——— ———. Authorized Signature ——— ———.

E

EXHIBIT NO. 9

Assessor's Office, Merced County.

Merced, Calif. March 5, 19 45

STATEMENT OF TAXES DUE ON PERSONAL PROPERTY OF

M UNKNOWN OWNERS

Oakdale Road near South West Corner of

ection 12-7-13

Article	Value	Rate	TAXES
P. P. AS PER STATEMENT FILED /			
Personel property located	on		
South 1/2 of South 1/4 of	Sec. 12-7-13		
	300,000.00	3.03	$9,090.00

These taxes are now due and payable. Kindly remit the amount $9,090.00 at once, and I will forward official receipt.

I have a number of deputies collecting taxes on unsecured property, whose work I have not checked up to date. If you have paid one of them, kindly return this statement with the name of the deputy and the date of payment.

J. EMMETT McNAMARA, County Assessor.

By Josed. Zinker, Deputy.

BRING THIS NOTICE WITH YOU OR ANSWER ON THE BACK OF THIS SHEET

[fol. 113] EXHIBIT "10"

Bigge Drayage Co., 24th & Campbell Sts., Oakland, Calif.

Phone—TWinoaks 1661

March 30, 1946.

Mr. Claude H. Adams, District Attorney, Merced County, Merced, California.

Mr. Scott D. Kellogg, Ward, Kellogg & Simmons, Mills Tower, San Francisco, California.

GENTLEMEN:

Subject: Empresa Siderurgica, S. A., Cement Plant, Merced, California

We have your letter of March 4, 1946, requesting us to prepare a letter to you giving the condition of the cement plant formerly owned by Yosemite-Portland Cement Co. with respect to its dismantled condition as of March 5, 1945.

Your letter states that you have agreed that 12% of the plant on that date was out of the jurisdiction of Merced County and therefore is not to be considered in our estimate.

We understand further that you have agreed that the repair parts and supplies included in the original contract and designated "Exhibit A" constitutes 20% of the total plant, and that all of this portion of the plant is to be considered in a dismantled condition.

[fol. 114] It is our understanding that you desire our estimate of the remaining 68% of the plant classified between the following stages of completion for shipment:

1. Dismantled and crated or prepared for shipment.
2. Dismantled but not crated.
3. Not dismantled.

In order to arrive at percentages for the above classifications, we have determined that, of our payroll applicable to the dismantling operation, 36% had been expended as of March 5, 1945. We have applied this 36% to the remaining 68% of the plant mentioned above, on the assumption that the 32%, representing the "Shipped" and "Exhibit A" portion of the plant, required only processing or crating and no dismantling.

The application of this 36% to 68% leaves 44% of plant as not dismantled. While we maintained no records by which an accurate estimate of the percentage of the plant "Dismantled and crated or prepared for shipment" could be determined, we believe that at least 10% of the plant was in this condition as of March 5, 1945.

A summary of the foregoing percentages follows:

1. Out of the Jurisdiction of Merced County	12%
2. Dismantled and Crated or Prepared for Shipment	10%
[fol. 115] 3. Dismantled but not Crated or Prepared for Shipment	34%
4. Not Dismantled	44%
Total	100%

Very truly yours, Bigge Drayage Co.; (S.) Henry W. Bigge, President.

WW:vh.

(Here follows 1 Photolithograph, side folio 116)

EXHIBIT NO. 11

(84A)

Paid Under Protest

Assessor's Office, Merced County

Merced, Calif., Aug. 31, 1945 No 3428

Received from Empresa Siderurgica, S.A. v Vanderbuegh & Co. Inc.

the sum of Seven Thousand Nine Hundred Ninety-Nine v 20/100 Dollars for State and County Taxes on Personal Property for the year 1945.

Assessed Value Personal Property, -	$264000	County Tax, - - - - - - - -	$7999 20
Less Householders' Exemption, - - - -	$	Lighting Tax, - - - - - - - -	$
Less Veterans' Exemption. - - - - - -	$	Special Tax, - - - - - - - -	$
Total Value Assessed, - - - - - - - - -	$264000	Special Tax, - - - - - - - -	$
Assessed Value Cash and Intangibles, -	$	Cash and Intangibles Tax, -	$
		Penalties, - - - - - - - - -	$
		Total Tax Due,	$7999 20

Eschscholtzia - MM MC

School District. Special District.

Payment Excluding 8 Cars shipped prior to Mar. 5, 1945 and 4 Cars being Loaded.

Subject to Revision by Supervisors.

J. EMMETT McNAMARA, Assessor.

By L M Brown, Deputy Assessor

[fol. 117] EXHIBIT No. 12

The Board of Supervisors of Merced County meet in regularly adjourned session this 1 day of September, 1945 at 10:00 A. M.

Present: Glenn M. Fountain, Frank E. Phinney, E. A. Griffin, Chairman; Harry P. Schmidt, J. L. Toscano, and R. W. Cothran, County Clerk.

In the Matter of correction of 1945 Assessment Roll

County Assessor J. Emmett McNamara, together with District Attorney Adams appear before the Board and Assessor McNamara requests that the 1945-46 Assessment roll be corrected as follows relative to property of Empresa Siderurgica and Vanderburgh & Co., from $300,000.00 to $264,000.00, same being for assessment reduction made because 14 cars of machinery were shipped prior to March 5, 1945, and the $300,000.00 was included in original assessment, and,

Upon motion of Supervisor Phinney, seconded by Supervisor Fountain;

It is ordered by the unanimous vote of the Board, that request of Assessor McNamara be, and same is hereby approved and allowed as requested.

October 29, 1945.

R. W. Cothran.

[fol. 118] EXHIBIT "13"

Cars Billed and Shipped

Yosemite Portland Cement Plant, Merced, California

3-2-45	ATSF	82416
3-2-45	ATSF	82624
3-3-45	ATSF	72597
3-3-45	ATSF	82679
3-5-45	ATSF	70090
3-5-45	ATSF	175007
3-5-45	ATSF	171012
3-5-45	ATSF	84599
3-14-45	ATSF	70344
3-15-45	ATSF	173947
3-15-45	ATSF	72874
3-16-45	ATSF	73631
3-17-45	WM	50982
3-17-45	PRR	358535
3-17-45	B&O	151475
3-19-45	PRR	286525

3-19-45	B&LE	36763
3-19-45	PRR	349252
3-21-45	MP	67068
3-21-45	ATSF	171486
5-5-45	ATSF	175233
5-5-45	EJ&E	80442
5-5-45	ATSF	172990
5-5-45	ATSF	175872
5-5-45	LV	34112
5-7-45	ATSF	83742
5-7-45	ATSF	174079
5-7-45	MP	29600
5-7-45	IC	94772
5-7-45	PENN	440059
6-11-45	DSS&A	10296
6-11-45	ATSF	172669
6-11-45	ATSF	175404
6-12-45	ATSF	175743
6-12-45	ATSF	170790
6-12-45	ATSF	79513
6-12-45	ATSF	172418
6-12-45	ATSF	82787
6-12-45	PRR	853119
6-12-45	ATSF	175475

[fol. 119]

6-29-45	ATSF	70174
6-29-45	ATSF	169884
6-29-45	ATSF	173414
6-29-45	ATSF	72842
6-29-45	ATSF	80904
6-29-45	ATSF	174630
6-29-45	ATSF	79831
6-29-45	ATSF	172184
6-29-45	ATSF	82436
6-29-45	ATSF	170810
6-29-45	ATSF	173481
6-29-45	ATSF	70302
6-29-45	PM	17256
6-29-45	MILW	84563
7-1-45	CB&Q	72068
7-2-45	IC	60565
7-2-45	GM&O	12363
9-12-45	MIL	600070
9-12-45	PA	471311
9-12-45	AT	90292
9-12-45	ATSF	90349
9-13-45	CBQ	91305
9-13-45	MIL	65681
9-13-45	CNW	40511
9-13-45	ATSF	97447
9-13-45	MILW	63805
9-14-45	MP	61395
9-14-45	CNW	47289
9-14-45	MIL	65716
9-14-45	RI	92695
9-14-45	ATSF	97437
9-15-45	SOU	51231
9-15-45	NYC	499157
9-15-45	WCEN	4021
9-15-45	MP	8159

9-15-45	SOOLINE	54455
9-16-45	T&P	5143
9-16-45	ATSF	83539
9-16-45	ATSF	175530
9-16-45	D&H	16041
9-16-45	ATSF	91127
9-16-45	ATSF	174045
9-27-45	CRP	105
9-27-45	CB&Q	92160
9-27-45	PRR	473835
9-27-45	NYC	499310
9-27-45	C&O	80708

[fols. 120-133]

9-27-45	BM	33561
9-27-45	ATSF	91081
9-28-45	DT&I	924
9-28-45	CGW	3817
9-28-45	SEABOARD	47241
9-28-45	ATSF	70235
9-28-45	ATSF	176035
9-29-45	ATSF	174259
9-29-45	SOUTHERN	175095
10-26-45	ATSF	83953
10-26-45	ATSF	170375
10-29-45	ATSF	81482
10-29-45	ATSF	176162
10-29-45	ATSF	82534
10-31-45	AT	97288
10-31-45	AT	172856
10-31-45	CBP	193
10-31-45	AT	90552
10-31-45	AT	83676
10-31-45	ATSF	83083
10-31-45	AT	175036
10-31-45	ATSF	83623
10-31-45	ATSF	173829
1-17-46	ATSF	175325
1-17-46	ATSF	170879
1-17-46	NYC	498315
1-17-46	ATSF	169508
1-17-46	ATSF	169732
1-17-46	ATSF	173227
1-17-46	ATSF	172857
1-17-46	ATSF	85706
1-17-46	ATSF	70474
1-17-46	ATSF	175326
1-18-46	B&O	202721
1-18-46	ATSF	169950
1-18-46	B&O	470115

[fol. 134] [File endorsement omitted]

Corrected Copy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF MERCED

Compared

No. 15928

EMPRESA SIDERURGICA, S.A. a Corporation of Colombia, South America, and Vanderburgh & Co., Inc., a California Corporation, Plaintiffs,

vs.

COUNTY OF MERCED, a Municipal Corporation, J. Emmett McNamara, Assessor of the County, et als., defendants

OPINION—Filed February 19, 1947

The Plaintiff, a corporation existing and located in Colombia, South America, entered into a contract with the Henry J. Kaiser Co. on November 11th, 1944, for the purchase for exportation of a cement plant located in Merced County, California. The plant was complete and fully equipped for immediate operation in the manufacture of cement. In preparation for this export the plaintiff on December 2, 1944 employed Vanderburgh & Co., Inc., a California corporation, as its forwarding agent to effect its contemplated export. On the same day Vanderburgh & Co., Inc. employed the Bigge Drayage Co. to dismantle the plant [fol. 135] and to take the first steps looking to its shipment to its purchaser in South America.

On December 15th, 1944 a license was obtained from the United States Foreign Economic Administration approving the export of this property as contemplated by the parties. The entire sale was made contingent upon the issuance of this license.

On January 3rd 1945 the Henry J. Kaiser Company was advised that a credit had been opened in their favor of the account and on behalf of plaintiff thus affecting full payment for the plant.

On the same day, January 3, 1945, Vanderburgh & Co., Inc. and the Bigge Drayage Co. entered into possession of the property and began dismantling and crating it preparatory to shipment. This work proceeded until on March

5th; 1945, the date upon which personal property taxes are levied in California, the County of Merced levied a tax upon the parts of the cement plant which were then in that County. This tax was paid by plaintiff under protest and this is an action brought for its recovery. On the 5th day of March, the day upon which the tax was levied the condition of the plant resulting from plaintiffs work of demolition and shipment was as follows:

1. 12% of the plant had been torn down, crated and shipped away.

2. 10% had been dismantled, crated and made ready [fol. 136] for shipment.

3. 34% had been dismantled but not crated and its parts were lying about the premises.

4. 44% not dismantled; standing in place.

By January 18, 1946 the entire plant had been shipped out of Merced County and by January 29th following the entire plant had been shipped out of the State of California and out of the United States. The sole question for decision in this case is, had the entire property of the cement plant become "export" prior to March 5th, 1945 or did the part of it which remained in Merced County on that day retain its character as part of the general property of the County?

Many cases have been decided relative to this question as it arose under the Commerce Clause of the Constitution. But in the very recent case of *Richfield Oil Company* vs. *State Board of Equalization*, not yet reported, but decided November 25, 1946, the Court felt compelled to state "There are few decisions of the Court under Article 1, Section 10, Clause 2 (of the Federal Constitution) which illuminate the problem". The question is at what moment does any portion of the general property of the State which may be intended for export or for the exportation of which a contract has been made becomes "export" and ceases to be such general property and exempt from local taxation. This is substantially a question of fact and in determining [fol. 137] it the Courts are not concerned with mere formalities but by matters of substance. The very early case of Coe vs. Errol, 116 U. S. 517 which involved the commerce clause of the Constitution but which stated a rule which has been adopted as a measure where the Export-Import

clause was in question, to the effect that "goods do not cease to be part of the general mass of property, in the State, subject as such to its jurisdiction, and to taxation in the usual way until they have been shipped or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey."

This rule has been so universally established that citations supporting it are unnecessary. It is enough to say that it was approved and applied in the Richfield case above cited. The delivery of goods to common carriers mentioned in the Coe vs. Errol case are not ends in themselves; the ultimate fact in all of these cases is, had the thing which has been done in the execution of the undertaking or contract of export resulted in committing the goods so definitely to export that the power of the exporter to defeat it is ended and that the goods may be said beyond any reasonable probability to have been so committed to exportation that there is a substantial certainty that their export will be completed. All of the cases require that something must have been done in furtherance of the export by which it can be said that the goods have "been [fol. 138] started upon" transportation. Some of the cases say that commerce does not begin until actual delivery has been made to a common carrier. But this is not essential. Such delivery is only one of the ways in which the devotion of goods to export may be accomplished.

"The certainty that goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved." Richfield Oil Corp. vs. State Board of Equalization, above.

In cases where delivery of the goods to a common carrier has been made, as stated by Chief Justice Taft, the decision is easy. "It is much more difficult" where the movement has been attended by other circumstances, or effected by other means. Hughes Bros. vs. Minnesota, 272 U. S. 469.

The question always remains, were the goods at the time a tax upon them is attempted, so definitely committed to export that the parties to the transaction have lost the

power to recall the goods or to devote them to a domestic use. There is no hard and fast rule by which the character of goods claiming the protection of Article 1, Section 10, Clause 2 of the Constitution can be unfailingly tested. Under this provision "we are concerned with matters of substance, not of form . . . the extent of its (the goods) [fol. 139] immunity from state taxation turns on the essential nature of the transaction considered in the light of the Constitutional purpose and not on the formalities with which the importation (exportation) is conducted" Hoover vs. Evatt, 324 U. S. 652, Western Oil Co. vs. Liscome 244 U. S. 346, where the Court say—"as this Court often has said it is the essential character of commerce . . . that is decisive".

In considering what so committed goods intended for export to a condition which it was held that their exportation was made reasonably certain many circumstances have been held to be sufficient which were less persuasive than the facts in this case.

In Clarke vs. Clarke, 3 Woods, 408, logs collected by a Georgia exporter and purchased for export, while still in port on the land in his possession and not sold at the time the tax was levied were held exempt where the logs had been subsequently exported. It will be noted that the logs had not been actually exported they had not even been sold for export, but the circumstances showed that they had definitely been devoted to exportation. In Texas Co. vs. Sabine Tram Co. 227 U. S. 111, lumber was shipped to a small seaport town. It was purchased for export but it had not been sold and no particular lumber set apart for any prospective purchaser but was selected and loaded as vessels arrived. The fact that the town was very small and the lumber for beyond its economic needs was given [fol. 140] consideration in determining the improbability that the lumber would not be exported. In Hughes Bros. vs. Minnesota the Court considered the fact that if a change of purpose to export was made that it would involve a breach of contract. The Hughes Bros. case is relevant here in another way. In that case pulp wood logs had been sold in Minnesota for transport to another state, the transportation to be made by floating the logs down a small river to its connection with another. In preparation for the delivery the timber was logged and the logs taken down

to the stream and placed, some of them on the ice and the balance on the bank, awaiting the breaking up of the ice. The ice broke April 29th "when the drive of the logs began, those on the ice moved by themselves and those on the bank were pushed in". The decision does not state how long it took to "push" in the logs. There were 10,000 cords of these logs and it it quite improbable that they had all been floated before May 1st which was the day upon which they were attempted to be taxed. No question of dividing the tax was raised; it seemed to be conceded that the movement of some of the logs was a beginning of a movement of them all. This would be determinative of the tax in the case before me so far as the ten per cent of the plant which was crated was concerned. When the twelve per cent. was shipped it was part of a movement of all the rest, like the logs on the bank, which was crated and ready for shipment as transportation could be had.

[fol. 141] It is an admitted fact in this case that the contemplated export of this plant was finally completed. "There has been a liberal construction of what is continuity of the journey in cases where the Court finds from the circumstances that export trade has been actually intended and carried through" Carson vs. Vial, 279 U. S. 95, 103.

The rule of decision announced in Hughes Brothers vs. Minnesota is singularly applicable to the case under discussion. There as hereinbefore stated certain logs had been sold for delivery by floating to another state. The logs had been taken to the bank of the stream where some of them had been placed on the ice and the remainder had been piled on the banks. The question was whether or not the logs had become the subject of interstate commerce before the levy of a certain tax upon them. In the course of its decision the Court said: "The conclusion in cases like this must be determined from the various circumstances. Mere intention by the owner ultimately to send the logs out of the state does not put them in interstate commerce, nor does preparatory gathering for that purpose at a depot. It must appear that the movement for another state has actually begun and is going on. Solution is easy when the shipment has been delivered to a carrier for a destination in another state. It is much more difficult when the owner retains complete control of the transportation and can change his mind and divert the delivery from the intended [fol. 142] interstate destination as in the Champlain Co.

case. The character of the shipment in such a case depends upon all of the evidential *circumstances looking to what the owner has done in the preparation for the journey and in carrying it out.*

The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if the other facts show that the journey has already begun in good faith and temporary interruptions of the passage is reasonable and in furtherance of the intended transportation as in the Champlain Co. case.

Elsewhere in the opinion it is said: "The contract and the method of complying with it are all circumstances however throwing light on the question whether the transportation in interstate commerce (in our case exportation) began."

In cases like this where goods have been purchased for exportation and action has been taken in execution of that purpose it is not a question of whether any particular thing has been done, but of whether or not what has been done in furtherance of a contract of export has so far committed the goods to exportation that there is no reasonable probability that the proposed export will not be concluded; that there remains no reasonable question or hypothesis upon which their exportation can be doubted. I think that it can be said that when the tax was levied upon the materials in [fol. 143] this case that it had become substantially certain that the mechanisms constituting the plant would be exported, as they subsequently were. This seems unquestionable when the facts as they existed March 5, 1944 are viewed from their several angles:

1. The materials of the plant became committed to export when the Bigge Company began dismantling the building. At that time the plaintiff had spent a great deal of time and effort in furtherance of his intention to export the whole plant. The firmness of its intention to export this property is shown by the fact that it would not commit itself to its purchase until it had obtained a license permitting its export. It had paid for the property. Before the Bigge Company had attacked it the plant had been a complete manufacturing unit. Immediately thereafter it was in process of destruction as such; the complete demolition of the structure was certain, the plaintiff was under contract to take it down and remove it from the premises. The plant could not have been re-erected upon its existing site; the

plaintiff did not own it. At that time it was certain that what had been the building would soon be a mass of parts. In the circumstances it was certain that they would come to be such at the time the Bigge Company first went to work.

These parts when placed in some warehouse or laid out on some lot which the plaintiff might secure would be mere "scrap" and of merely speculative value for any purpose except for the use for which they were purchased.

[fol. 144] I think that the payment for the property and proceeding to change it from parts in place of a complete building, into a mass of disconnected materials made the completion of the exportation economically imperative. This was not a mere preparation of the plant for exportation; by such action and change the parts had "been started upon such transportation" with the degree of certainty demanded by Coe vs. Errol and the many cases which have endorsed it.

In this case, stronger than in the Hughes Bros. case the first owner of the plant had been paid for his plant and it was at that time in the sole possession of the Plaintiff. Thus one source of uncertainty as to whether the purpose to export would be executed did not exist; the Kaiser Company could not prevent it. The only contingency upon which the export would be abandoned after the demolition of the building had become assured was therefore, that the plaintiff would abandon his purpose and sell the parts here at a substantial loss, or re-erect the plant in California where the plaintiff was not engaged in business. This suggests an improbable hypothesis. "There was not the slightest probability of any such change, and it did not occur" Spaulding Bros. v. Edwards, 262 U. S. 66.

In reaching this conclusion I am not considering the shipment of the twelve per cent of the property which was later exported as this fact was not certain at the time the Bigge Company began taking the building down.

[fol. 145] 2. If the exportation of the materials of the plant was not before assured, that became certain when the twelve per cent of the corpus of the building had been sent abroad. In support of this conclusion I repeat all of the elements of certainty of export mentioned above and in addition I cite this circumstance. Whatever possibility there might have been that after plaintiff had torn the plant down and carried the parts off the premises that it would sell

them or re-erect them into a plant in California would be rendered extremely improbable when it appeared that it had kept here only a part of the materials of the plant which of course could not be sold as the materials from which a plant could be built or used to reassemble the old one.

3. When the building was in process of demolition and twelve per cent of its parts had been exported the entire plant was in process of "movement" toward the sea, as required by the source case of Coe vs. Errol. The plant was a unit composed of many parts. It was of great size and weight and could only be moved through moving the parts as they were moved here. When the first shipments were made from the plant we would not say that the contractors were moving a beam or a brace; we would say that they had begun to move the plant, that the entire property was in process of moving. It could not be said as part after part of the plant had been moved down to the last rod or pulley, that what was left had remained unmoved in a very appre- [fol. 146] ciable way every abstraction from the building affected what was left. If a body of stevedores had been hired to unload a ship, at their first movement we would not say that they were moving a piano, or a sack of wool, we would say that they were unloading the ship. In this case when the plaintiff exported twelve percent of the plant and was in process of shipping the rest the movement of the whole plant toward the sea had begun, as in the Hughes Brothers case where the first logs were being "pushed" into the stream the whole mass was being pushed in.

For the reasons stated there could remain no reasonable doubt that at the time the tax was levied that the whole shipment would be made as it finally was.

"The means of shipment are unimportant as long as the certainty of the foreign destination is plain." Richfield Oil Co. vs. State, supra. Where the Court finds from the "circumstances" that an export trade had been actually intended and carried through the Court will be liberal in construing the manner in which the export had been executed. Carson Petrol Co. vs. Vial, 279 U. S. 95.

The Judgment will be for the Plaintiff.

Dated: Jany. 31, 1947.

(S.) Peter J. Shields, Judge Superior Court.

The above is for substitution of the opinion filed Feby. 3rd, 1947 and is an exact duplicate of it with the exception of the correction of a few clerical errors which occurred in the copy first filed. This copy to be the official copy.

Peter J. Shields, Judge.

[fol. 147] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF MERCED

No. 15928

EMPRESA SIDERURGICA, S. A., a Corporation, et al., Plaintiffs,

vs.

COUNTY OF MERCED, a Municipal Corporation, et al., Defendants

JUDGMENT—Filed March 20, 1947

The above-entitled cause came on regularly for trial on the eighth day of November, 1946, before the Court sitting without a jury, a jury having been expressly waived, Scott D. Kellogg and Betsy FitzGerald Rahn appearing for plaintiffs, and Claude H. Adams appearing for defendants, and evidence consisting of a Stipulation and Agreed Statement of Facts to which certain documents were attached and incorporated by reference having been introduced and the cause submitted for decision, and the Court having heretofore made and caused to be filed herein its written findings of fact and conclusions of law, and being fully advised;

Wherefore, by reason of the law and the findings of fact aforesaid, it is Ordered, Adjudged, and Decreed that the plaintiff, Empresa Siderurgica, S. A. do have and recover of [fol. 148] and from the defendant, County of Merced, a municipal corporation, the sum of $7,999.20 with interest thereon at the rate of five (5) per centum per annum from August 31, 1945, until paid, together with plaintiff's costs and disbursements incurred in said action amounting to the sum of $7.50.

Dated: March 19th, 1947.

(S.) Peter J. Shields, Judge Pro Tem of the Superior Court of the County of Merced, State of California.

[fol. 149] [File endorsement omitted]

[Title omitted]

IN SUPERIOR COURT OF MERCED COUNTY

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed March 20, 1947

This case coming on regularly to be heard on the 8th day of November, 1946, before the Court sitting without a jury, a jury having been expressly waived, Scott D. Kellogg and Betsy FitzGerald Rahm appearing for plaintiffs, and Claude H. Adams, District Attorney of Merced County appearing for defendants, and evidence consisting of a Stipulation and Agreed Statement of Facts to which certain documents were attached and incorporated by reference having been introduced and the cause submitted for decision, the Court now makes its findings of fact as follows:

FINDINGS OF FACT

No testimony was offered or evidence received at the hearing hereof, but it appeared that preceding the trial the [fol. 150] parties hereto had prepared and agreed upon the facts in the case and had reduced their agreement to writing. When the above entitled cause was called for trial and the trial had been entered upon, it was stipulated in open court by the attorneys herein, representing all of the parties hereto, that the case should be submitted upon said statement of facts and that no other or further evidence should be received or heard.

Now, therefore, the Court finds the facts herein to be as stated in said Stipulation and Agreed Statement of Facts now on file in the office of the County Clerk of the County of Merced, State of California, entitled as herein, filed on the 5th day of July, 1946, and denominated as "Stipulation and Agreed Statement of Facts".

The Court further finds that the cement plant involved in this action was purchased by the plaintiff, a corporation existing in and resident of Colombia, South America; that it was purchased for the purpose of exporting it to that place, and that it was finally so exported. That in pursuance of its purpose to export the said cement plant, the plaintiff, prior to March 5th, 1945, paid for said plant and took possession thereof. That said purchaser entered into

a contract by which it employed aVnderburgh & Co., Inc., an exporting corporation as its forwarding agent.

That prior to March 5, 1945, the plaintiff obtained from the Federal Government an export license permitting the [fol. 151] export of the cement plant.

That prior to March 5, 1945, Biggee Drayage Co. was employed to dismantle the plant and to attend to its shipment, and that it had entered upon the performance of that employment.

The Court further finds that the plaintiff purchaser had no use for the dismantled parts of the cement plant, in this country, or any use for such parts except for exportation, the use for which such plant and its parts were purchased.

The Court further finds that on March 5, 1945, the day upon which the parts of the plant were attempted to be taxed, the condition of the plant and the constituent parts thereof was as follows:

12% of the plant represented by parts thereof had been shipped out of the County of Merced.

10% dismantled and crated and prepared for shipment.

34% dismantled but not crated or prepared for shipment.

44% not dismantled.

Conclusions of Law

I

That on March 5, 1945, the proposed exportation of the cement plant was in process of execution and that before and on that day the plant and the parts thereof were moving or being made to move toward Colombia, South America.

[fol. 152]

II

That on March 5, 1945, the cement plant and the parts thereof were so definitely committed to exportation and had advanced so far in the execution of a planned and finally accomplished exportation that its taxation was prohibited by Article I, Section 10, Clause 2 of the Constitution of the United States.

III.

That the attempted taxation of the cement plant and the parts thereof as attempted by defendants was without authority of law and void under the provisions of the Constitution of the United States.

IV.

That judgment should be given herein in favor of the plaintiff Empresa Siderurgica, S. A. to have and recover of and from the defendant, County of Merced, a municipal corporation, the sum of Seven Thousand Nine Hundred Ninety-nine and 20/100 ($7,999.20) Dollars, with interest thereon at the rate of five (5%) percent per annum from August 31, 1945, until paid, together with plaintiff's costs and disbursements incurred in said action amounting to the sum of Seven and 50/100 ($7.50) Dollars.

Dated March 19th, 1947.

(S.) Peter J. Shields, Judge Pro Tem of the Superior Court of the County of Merced, State of California.

[fol. 153] [File endorsement omitted]

[Title omitted]

IN THE SUPERIOR COURT OF MERCED COUNTY

NOTICE OF ENTRY OF JUDGMENT—Filed April 8, 1947

To the Defendants above named and to Their Attorney, Frank C. Hale, Esq.:

You will please take notice that on March 20, 1947, judgment was entered herein in favor of the plaintiff, Empresa Siderurgica, S. A., and against the defendant, County of Merced, a copy of said judgment is attached hereto and incorporated herein by reference.

Dated: April 7, 1947.

Ward, Kellogg, Simmons & Warren, by Scott D. Kellogg, Attorneys for Plaintiffs.

[fol. 154] Judgment Omitted. Printed side page 147 ante.

[fol. 155] (Affidavit of Service by Mail—1013a, C.C.P.)

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Scott D. Kellogg, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the county of aforesaid; that affiant is over the age of eighteen years and is not a party to the within above entitled action; that affiant's business address is 923 Ninth & Hill Building, Los Angeles 15, California, that on the 7th day of April, 1947, affiant served the within Notice of Entry of Judgment on the Defendants in said action, by placing a true copy thereof in an envelope addressed to the attorney of record for said Defendants at the office address of said attorney, as follows:

Frank C. Hale, Esq.
District Attorney
Merced County
Merced, California:

and by then sealing said envelope and depositing the same, [fol. 156] with postage thereon fully prepaid, in the United States Mail at the city where is located the office of the attorney for the person by and for whom said service was made.

That there is a delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

Scott D. Kellogg.

Subscribed and sworn to before me this 7th day of April, 1947. Dorris Copeland, Notary Public in and for Said County and State of California. My Commission Expires May 11, 1949. (Seal.)

[fol. 157] [File endorsement omitted]

[Title omitted]

IN SUPERIOR COURT OF MERCED COUNTY

NOTICE OF APPEAL TO SUPREME COURT—Filed May 17, 1947

To the Clerk of the Above-entitled Court:

You will please take notice that the defendants in the above-entitled action hereby appeal to the supreme court of the State of California, from the judgment therein entered, in the said superior court, on the 19th Day of March, 1947, in favor of the plaintiff in said action, and against said defendants; and from the whole thereof.

Dated this 17th day of May, 1947.

Frank C. Hale, District Attorney, by Samuel V. Cornell, Attorney for Defendants.

[fol. 158] [File endorsement omitted]

[Title omitted]

IN SUPERIOR COURT OF MERCED COUNTY

NOTICE TO PREPARE PAPERS ON APPEAL—Filed May 19, 1947

To the Clerk of the Above-entitled Court:

Please take notice that the defendants have appealed from the judgment heretofore entered in the above-entitled action, on the 19th day of March, 1947, in favor of the plaintiffs, Empresa Siderurgica, S. A., et al., in said action and against the defendants, and from the whole thereof, and request that a clerk's transcript and a transcript of the testimony offered or taken, the evidence offered or received, all rulings, instructions, acts, or statements of the court, and this said notice to the county clerk to prepare the papers on appeal be made up and prepared.

Frank C. Hale, District Attorney, by Samuel V. Cornell, Attorney for Defendants.

[fol. 159] [File endorsement omitted]

[Title omitted]

IN SUPERIOR COURT OF MERCED COUNTY

SUPPLEMENTAL NOTICE TO PREPARE PAPERS ON APPEAL—Filed May 23, 1947

Please take notice that the defendants have appealed from the judgment heretofore entered in the above-entitled action, on the 19th day of March, 1947, in favor of the plaintiffs, Empresa Siderurgica, S. A., et al., in said action and against the defendants, and from the whole thereof, and request that a clerk's transcript and a transcript of the testimony offered or taken, the evidence offered or received, all rulings, instructions, acts, or statements of the court, including the opinion of trial judge on file herein, and this said notice to the county clerk to prepare the papers on appeal be made up and prepared.

Frank C. Hale, District Attorney, Merced, California,
Attorney for Defendants.

[fols. 160-161] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 162] IN THE SUPREME COURT OF CALIFORNIA

Sacramento No. 5893

EMPRESA SIDERURGICA, S. A., a Corporation of Colombia, South America, and Vanderburgh & Co., Inc., a California Corporation, Plaintiffs and Respondents,

vs.

COUNTY OF MERCED, a Municipal Corporation; J. EMMETT MCNAMARA, Assessor of the County of Merced; et al., Defendants and Appellants

DOCKET ENTRIES

September 30, 1947. Filed Transcript C 1 R 1 from J.
December 29, 1947. Filed Affidavit for Time and Order App't to 1-28-48.

February 4, 1948. Filed Substitution of Attorneys: Scott D. Kellogg in lieu of Ward, Kellogg, Simmons & Warren for respondents.

February 4, 1948. Ordered on Bank Calendar, Sac, Mar. 3, 1948.

February 10, 1948. Filed Appellants opening Brief.

Mar. 3, 1948. Cause Called, Submission deferred pending filing of briefs.

Mar. 3, 1948. Filed Stip: Resps. to May 10, 1948, to file brief.

April 3, 1948. Ordered on Bank Calendar, S. F., May 4, 1948.

[fol. 163] April 5, 1948. Filed Respt. Brief.

April 30, 1948. Filed Appellants Reply Brief.

May 4, 1948. Argued and Submitted.

June 15, 1948. The Judgment is Reversed.

Edmonds, J.

We concur:

Gibson, C. J.; Shenk, J.; Carter, J.; Traynor, J.; Schauer, J.; Spence, J.

January 30, 1948. Filed Respondent's Petition for Rehearing (Due 7-15-48).

July 7, 1948. Filed Answer to Petition.

July 8, 1948. Rehearing Denied.

July 16, 1948. Remittitur Issued.

August 19, 1948. Filed Petition for Appeal, Assignment of Errors, and Prayer for Reversal.

August 19, 1948. Filed Statement as to Jurisdiction.

August 19, 1948. Filed Order Allowing Appeal.

August 19, 1948. Filed Citation on Appeal.

August 19, 1948. Filed Cost Bond ($500.00)—Indemnity Insurance Co. of N. A.

August 19, 1948. Filed Notice of Appeal and Statement under Rule 12.

August 19, 1948. Filed Praecipe for Transcript on Appeal to U. S. Supreme Court.

August 19, 1948. Filed Proof of Service on Appellee.

September 3, 1948. Filed Statement of Atty. Gen.—Opposing Jurisdiction and Motion to Dismiss or Affirm.

[fols. 164-165] September 21, 1948. Filed Stipulation Deleting Unofficial Opinion of Judge Shields from Record Certified to Supreme Court of the United States.

September 21, 1948. Filed Statement of Points On Which Appellants Intend to Rely, and Designation of Record.

September 22, 1948. Filed Stipulation for Correction of Opinion of Trial Court.

[fol. 166] IN SUPREME COURT OF CALIFORNIA

[Sac. No. 5893. In Bank. June 15, 1948]

EMPRESA SIDERURGICA, S.A., (a Corporation of Colombia, South America) et al., Respondents,

v.

COUNTY OF MERCED, et al., Appellants

Appeal from a judgment of the Superior Court of Merced County: Peter J. Shields, Judge assigned. Reversed.

Action to recover taxes paid under protest. Judgment for plaintiffs reversed.

Fred N. Howser, Attorney General, James E. Sabine, Deputy Attorney General, and Frank C. Hale, District Attorney, for Appellants.

Scott D. Kellogg, Raymond Salisbury and Betsy Fitz-Gerald Hahn for Respondents.

OPINION

EDMONDS, J.

The status of personal property sold to a foreign purchaser but in this state on tax day is the question presented for decision by the county of Merced upon its appeal from [fol. 167] an adverse judgment in an action to recover taxes. Although part of the property had been prepared for export, the greater portion of it was not in that condition and all of it was located at the plant of the seller in Merced County.

The following facts were presented by stipulation. In November, 1944, Empresa Siderurgica, S. A., a corporation organized under the laws of Colombia, South America, agreed to buy from Henry J. Kaiser Company the machinery and equipment of a cement plant. The contract of sale provided that title to the property should be transferred to the purchaser whenever it had furnished a letter of credit and

an export license issued by the appropriate governmental agency.

Early in January, 1945, the required license had been obtained and a satisfactory letter of credit covering the unpaid balance of the purchase price deposited with a bank. The work of dismantling the plant and packaging it for shipment was then commenced by Bigge Drayage Company, pursuant to a contract made by it with the purchaser's forwarding agent. The Bigge Company conducts a general trucking business and is a common carrier by motor vehicle, licensed by the Interstate Commerce Commission to engage in interstate and foreign commerce.

The dismantling and packaging operations continued expeditiously, with due regard for war-time shipping conditions, throughout the succeeding months, the packages being labeled at the plant site with the name of Empresa, as consignee. The specified place of delivery was Medellin, Colombia, South America. By March 5, 1945, the statutory date for the assessment of property for the tax year 1945-46, 12 per cent of the plant had been shipped out of the county; 10 per cent had been dismantled and crated or prepared for shipment; 34 per cent had been dismantled but not crated or prepared for shipment; and 44 per cent had not been dismantled. Not later than January 18, 1946, all of the machinery had been shipped out of the county of Merced on cars of the Atchison, Topeka, and Santa Fe Railway Company, and before the end of that month was enroute to South America by ocean carrier.

The original assessment, made upon the basis of the value of the entire plant, was reduced by the board of supervisors to require payment of taxes only upon the 88 per cent of the plant which was in the county on tax day. Empresa paid under protest the amount of the tax computed accordingly.

The position of the county is that, on tax day, none of the property assessed had begun its journey to a foreign destina- [fol. 168] tion and, therefore, had not acquired the status of an export. Until the goods have been delivered to a common carrier for transportation, they say, such property is not an export and may be taxed. Empresa maintains that, at the time of the assessment, the plant was an export because by the agreement for the sale of the property the parties intended foreign shipment and neither party could prevent its exportation without breaching the contract. It is also argued that because of Bigge's license as a common carrier, the delivery of possession to that company was the

same as delivery to a railroad or a ship; the foreign destination was fixed and if on tax day any part of the plant was an export, all of it came within that category.

[1] Article I, section 10, clause 2, of the Constitution of the United States provides: "No State shall without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports. . . . ." The trial judge determined, as a matter of law, that when the goods have been committed to exportation, a tax imposed upon them amounts to taxation of an export. Another basis for the decision was that "proceeding to change . . . [the plant] from parts in place of a complete building, into a mass of disconnected materials made the completion of the exportation economically imperative. This was not a mere preparation of the plant for exportation; by such action and change the parts had 'been started upon such transportation' with the degree of certainty demanded by *Coe* v. *Errol,* [116 U. S. 517 (6 S. Ct. 475, 29 L. Ed. 715)] and the many cases which have endorsed it."

In the Coe case logs had been floated down a river to the town of Errol, where they were to be shipped in interstate commerce. The town's assessment of them was attacked upon the ground that, at the time of the levy, they were in such commerce and not subject to taxation. The court, in deciding against the property owner, stated that "no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State." (P. 527.) But it declared "that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or [fol. 169] journey. . . . . It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many States there would be nothing but the lands and real estate to bear the taxes. Some of the Western States produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general

property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State. . . . But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain" (pp. 528). Although this decision was based upon the commerce clause of the Constitution, the same principles have been stated and followed in the few cases which have applied either article I, section 10, clause 2, or article I, section 9, clause 5 of the Constitution. (*Richfield Oil Corp.* v. *United Bd. of Eq.*, 329 U. S. 69, 79 [67 S. Ct. 156, 91 L. Ed. 80]; *Turpin* v. *Burgess*, 117 U. S. 504, 506 [6 S. Ct. 835, 29 L. Ed. 988]; *Brown* v. *Maryland*, 12 Wheat. (U. S.) 419 [6 L. Ed. 678].)

In *Von Hamm-Young Co.* v. *City and County of San Francisco*, 29 Cal. 2d 798 [178 P. 2d 745, 171 A. L. R. 274], relied upon by Empresa, goods purchased in San Francisco and moved from the place of purchase to warehouses to await shipping space were held to be exempt from tax because of the commerce clause. It was there said that "the movement of the goods from the place of purchase to the warehouses must be considered a movement in interstate commerce . . ." (P. 807.) In the present case, there was no movement of the goods from the place of purchase. The Bigge Company, which had the contract for dismantling and packaging, performed this function at the plant site. Eventually, the packaged goods were delivered to the railroad company, whose tracks ran alongside the plant site, for transportation to the port of embarkation. But except for the 12 per cent of the machinery which was not in the [fol. 170] county on tax day, none of the packages had been delivered to the railroad carrier.

In the Richfield Oil Corporation case, *supra*, the court said: "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree

of certainty may exist though no common carrier is involved." (P. 82.) In that case the plaintiff corporation sold oil to the New Zealand government f.o.b. its tanker at Los Angeles for export to that country. Although title passed upon delivery to the tanker, a sales tax was levied against the gross amount of the sale. After payment, plaintiff sued for refund, invoking the exemption of section 10, article I of the Constitution. The tax was held invalid because delivery to the purchaser's carrier constituted the commencement of exportation to the same extent as would delivery to a common carrier in the usual situation. The court stated, "Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad." (P. 83.) As in *Coe* v. *Errol*, *supra*, the determining factor was not the owner's intention to export but whether or not exportation had commenced.

[2] On tax day, the machinery which is the subject of the assessment here under attack had been delivered into the possession of the forwarding agent for the purpose of packing and shipping it. But the preparations for shipment, including the preparation of foreign documents and bills of lading, negotiations for shipping space by rail and sea and incidental activities in readying the machinery for shipment out of the country are not the equivalent of delivery to a common carrier for transportation. The fact that the Bigge Company was licensed as a common carrier in interstate and foreign commerce is not material, for it was not employed to perform the functions of such a carrier; it undertook only to dismantle and prepare the property for shipment. It cannot, therefore, be seriously contended that delivery of possession to Bigge was equivalent to delivery to a common carrier for transportation.

[3] The property owner's argument that because 12 per cent of the plant had been shipped out of the county and was clearly an export, the remaining 88 per cent, whether dismantled and packaged or not, was likewise an export, cannot [fol. 171] be sustained. This contention assumes that intention to export rather than the commencement of exportation is the determining factor. The fact that a portion of the plant had actually been shipped is not controlling as to that portion which was in the process of preparation for exportation, although there can be no question concerning the

owner's intention to take it out of the country. "The exemption attaches to the export and not to the article before its exportation. . . ." (*Cornell* v. *Coyne*, 192 U. S. 418, 427 [24 S. Ct. 383, 48 L. Ed. 504].)

The judgment is reversed.

Gibson, C. J., Shenk, J., Carter, J., Traynor, J., Schauer, J., and Spence, J., concurred.

[fol. 172] Clerk's Certificate to foregoing paper omitted in printing.

[fols. 173-174] [File endorsement omitted]

[fol. 175] IN THE SUPREME COURT OF CALIFORNIA

[Title omitted]

RESPONDENTS' PETITION FOR A REHEARING—Filed June 30, 1948

To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

The respondents, Empresa Siderurgica, S. A. et al., respectfully petition the Court for a rehearing in the above entitled case.

[fol. 176] In their briefs appellants urge that a complete and operating cement plant which was sold as a unit must all be delivered to a railroad common carrier before it becomes an export but concede if part of the unit has been delivered to a railroad common carrier, that part is exempt from tax. They also compare the dismantling and packaging to the manufacture of filled cheese, the raising of cattle and the growing of grain. The Court concludes that Article I, Section 10, Clause 2 of the Constitution permits a tax on part of an export even though all of the acts done were only the regular steps to effect its exportation.

We assume, therefore, that the only question which now concerns the Court is the application of Article I, Section 10, Clause 2, to the facts in this case.

The Court relies primarily upon the decision of the United States Supreme Court in *Richfield Oil Corp. v. State Board*, 329 U. S. 69 as stating the rule that there must be delivery to a carrier and does not cite or discuss the decision of the United States Supreme Court in *A. G. Spalding & Brothers v. Edwards*, 262 U. S. 66. It is respectfully submitted that both of these cases affirm the fundamental rule that the certainty that goods are headed to sea may exist though no carrier is involved.

The Court's failure to discuss the *Spalding* case and by comparing dismantling and packaging, which are the usual and regular steps in the process of exportation, to manufacturing of articles or growing crops, coupled with its [fol. 177] failure to follow the plain teachings of the decisions of the United States Supreme Court in every case involving an export, in our eyes, makes further consideration of the case necessary. Coming at a time when California has the opportunity to become one of the foremost States in international trade, this decision is viewed with concern and may well defeat the policies and purposes of the legislature and the business and labor groups in this State in the encouragement of foreign trade.

We propose to show:

(1) That the facts found by the Court were different from the facts presented by stipulation to the trial Court.

(2) That dismantling and packaging of an entire cement plant are the usual, regular and necessary steps in the process of exportation.

(3) That dismantling and packaging are not the same as manufacturing or growing crops.

(4) That delivery to export forwarding agent has been held to commit goods as an export.

(5) That the Court did not cite nor refer to the *Spalding* case relied upon by respondents.

(6) That export cases are concerned with matters of substance not of form.

The emphasis in quotations in our argument is ours.

[fol. 178] I

The Facts Are Different

It is respectfully submitted that the facts as presented to the trial Court by stipulation reflect the following to be true:

The status of personal property consisting of the major portion of an entire cement plant in this state on tax day (the remaining portion having already been shipped out of the County) is the question presented for decision by the County of Merced upon its appeal from an adverse judgment in an action to recover taxes. Part of the cement plant had been shipped out of the County and in the course of transportation to the foreign destination, part had been prepared for export, and the greater portion of it was not in that condition and all of the plant except that which was shipped was located at its situs in Merced County.

The Court's attention is called to the following references in said stipulation:

Negotiations were entered into "for the purchase of the *Yosemite Portland Cement Plant*, its machinery and equipment." (C.T. 34.)

". . . Henry J. Kaiser Company entered into a written contract for the sale to Empresa Siderurgica, S. A. of that certain property known as *Yosemite Portland Cement Plant*. . . ." (C.T. 34-35.)

The forwarding agent ". . . entered into a contract with Bigge Drayage Co., . . . to dismantle the said *cement plant*, disassemble the equipment, package the same for shipment [fol. 179] and deliver said *cement plant* for shipment to Medellin, Colombia, S. A. That said *cement plant* was delivered by Bigge Drayage Co. to the Atchison, Topeka and Santa Fe Railway Co. at the plant site for transportation by rail to the point of embarkation; that all of the plant was shipped from the point of embarkation by water carrier to Colombia, South America. . . ." (C.T. 35-36.)

"For the purposes of this statement of facts and to denote the various companies and contracts, we refer to the *Yosemite Portland Cement Plant* as '*cement plant*'; . . ." (C.T. 36.)

" 'After such transfer of title, all risk and liability for any loss or damage to the *cement plant*, of any nature whatsoever, shall be upon the Transfer Agent and/or Purchaser, . . .' " (C.T. 37.)

The Export License issued by the United States Foreign Economic Administration described the export as "constitute the total known requirements for this *cement manufacturing plant.*" (C.T. 104.)

". . . a letter of credit covering the balance of the purchase price of said *cement plant* was deposited. . . ." (C.T. 38.)

Forwarding agent wrote Bigge Drayage Co. ". . . you are hereby notified that on this date purchaser acquired title and we took delivery of the *cement plant*, . . ." (C.T. 38.)

". . . Kaiser Company gave to Vanderburgh a power of attorney to do and perform on its part and behalf any [fol. 180] thing or act necessary or proper in connection with transportation or exportation . . . under export license SP#2086 issued to Kaiser Company and covering the said *cement plant;* . . ."

". . . actual shipment of the said *cement plant* and equipment continued expeditiously with due regard for war time shipping conditions throughout January, 1945, and the succeeding months; . . ." (C.T. 39.)

". . . County Assessor of Merced County assessed personal property taxes in the sum of Nine Thousand Ninety Dollars ($9,090.00) against the said *cement plant*. . . . At the time of such assessment, twelve per cent (12%) of the dismantled plant were out of the jurisdiction of the County of Merced." (C.T. 39-40.)

The attention of the Court is respectfully called to the fact that throughout the stipulated statement of facts, the cement plant is treated as a unit and referred to as such.

Even the Assessor when taxing the plant on March 5, 1945, considered the plant as a unit and taxed it as such. (C.T. 40.)

The intention that the cement plant was to be reassembled at its foriegn destination may be had by reference to the

Bigge contract and re-emphasizes the fact that the plant was a unit.

Paragraph 12. "The work of dismantling the Cement Plant is to be performed . . . in the manner which . . . is likely to do the least possible damage to the various parts thereof. . . ." (C.T. 58.)

[fol. 181] Paragraph 14. "Contractor shall take at least one photograph of each machine or piece of equipment before dismantling said machine or piece of equipment, and shall also take at least one photograph after such machine or piece of equipment is dismantled. Such photographs shall be numbered and bear the same identification marks as the parts of which they are pictures, and shall be kept in numerical order, or such other adequate filing system, as may be approved by Representative so as to be readily accessible to persons reassembling the plant." (C.T. 59.)

Paragraph 18. "All separations shall be made at the point of joinder, and there shall be no cutting or disassembling of any part of the Cement Plant which will have as its effect the weakening of the structure or parts when such structure or parts are reassembled, . . ." (C.T. 61.)

Paragraph 19. "All cylindrical parts are to be separated at the point of joinder . . .; provided, however, that if any single section without a point of joinder is more than 25′ in length or 125″ in diameter, said section shall be shipped as a unit and shall not be cut or divided to meet the above limitations. . . ." (C.T. 61-62.)

Paragraph 20. "All parts other than the cylindrical sections shall be separated at their point of joinder. . . . Provided, however, that if any single section without a point of joinder is more than 25′ in length, 140″ in width and 80″ in height or weighs more than 5 thousand kilos, said section [fol. 182] shall be shipped as a unit and shall not be cut or divided to meet the above limitations. . . ." (C.T. 62.)

Paragraph 33. "The Contractor shall match-mark all parts of the plant and equipment . . ., and all machines must have a master identification mark. All manufacturers' identification marks and/or serial numbers shall be preserved. All marking and numbering shall be done with waterproof paint or paint covered with shellac." (C.T. 64-65.)

Kaiser could not deliver only 12% of the cement plant and retain 12% of the purchase price nor could Bigge dismantle and package 12% of the cement plant and retain 12% of the contract consideration. It had to be 100%.

Looking at the apportionment approved by this Court, we find the facts completely disregarded. A cement plant less twelve percent is no cement plant at all. Nor is 88% of a cement plant, a cement plant.

Preceding the negotiations for the purchase of the Yosemite Portland Cement Plant, Empresa had looked at several in the United States. They had looked at only operating cement plants because an operating cement plant was what was needed and nothing less than that would meet their needs. It was insisted at the time the contract was being prepared that Kaiser make the following warranty: "Seller represents that said cement plant was being operated until July 1, 1944, that Seller purchased said cement plant from its former operator in operating condition as of that time, [fol. 183] and Seller warrants that it has not thereafter sold or removed any equipment or property from said cement plant. . . ." (C.T. 46.).

The tax was first assessed as to the entire cement plant as an operating cement plant at its valuation for tax purposes. Then when it was learned that under no theory could there be any tax on the part of the cement plant which was on its way to South America, the tax was reduced by calculating that 14 cars out of a total of 123 shipped is 12% and that therefore one cement plant less 14 carloads should be taxed at 12% less than a complete and operating cement plant should be taxed. This is obviously overlooking the realities of the situation. An automobile with all its working parts is a valuable machine. Without a motor or the availability of a motor, it is valueless except for junk. This is precisely the situation with respect to the cement plant. There were few operating cement plants for sale in the world and cement had became a war scarcity. It was in the interest of the war effort that Colombia should have a cement plant and as no new cement plants could be manufactured nor could the parts be manufactured, Colombia had to take a plant which had been used. A cement plant less 14 carloads was of no value to them, nor was it of any value to the Seller. Its value could only be calculated as junk or

by the ton. It is not conceivable that the value of 109 carloads of junk iron and steel would be of the value of $8,000.00, yet this is the tax which is to be sustained.

[fol. 184] It is respectfully submitted that the statement of facts should reflect that an entire operating cement plant was sold and delivered to the foreign purchaser and that a portion of the cement plant (12% or 14 carloads) was in transit and in the course of commerce to South America on the tax day. That the tax was originally assessed against the entire plant and later reduced by the 12% in recognition of the shipment of part of the cement plant. That dismantling, packaging and shipping operations continued expeditiously and continuously from January 1945 at the time title passed to the foreign purchaser until the entire plant had been completely shipped out of the County of Merced, State of California and the United States.

II

Dismantling and Packaging of an Entire Cement Plant Are the Usual, Regular and Necessary Steps in the Process of Exportation

The cement plant in its operative state was sold, it was in existence, there was nothing to be done to it to make it an operative cement plant, there was no manufacturing necessary to place it in that condition. All that was necessary was that it be removed to the foreign destination. As we all can recognize it is not a simple matter to move an operative cement plant. It cannot be placed on a freight car nor can it even be placed on one boat, even if it were possible to lift it bodily without dismantling it. Therefore, the only method to appropriate it for exportation and to [fol. 185] start its movement was to dismantle and crate its component parts.

It is the position of the Respondents that when Bigge Drayage Company took possession of the plant and removed the first bolt or rivet under its contract to dismantle, crate and load on freight cars, that this was the overt act which committed the entire plant to exportation, coupled also with the continuous operation of Bigge until the whole of the plant, without cessation, was completely exported in accordance with its contract and fulfilling the contract executed between Empresa and Kaiser.

It is not, however, necessary to start at that point since more than two months had elapsed from the time of Bigge starting its work and the tax day. On March 5, 1945, 14 carloads had been shipped and the work continued expeditiously (without cessation) until the entire 123 carloads had been shipped.

The Constitution of the United States does not differentiate between large and small articles. The Supreme Court of the United States in its decisions has not made any such differentiation. Either the entire cement plant is an export or it is not. Never before has there been any decision of this Court or of the Supreme Court of the United States where an apportionment of an export has been attempted.

The decision in this case carried to its logical conclusion would necessarily mean that no exportation of a large plant [fol. 186] such as a cement plant or a steel mill could be made without incurring a tax as to the portion not yet physically loaded upon railroad cars. Does the Constitution mean that small articles may not be taxed because they may easily be loaded on railroad cars, but large articles such as a cement plant may only have such exemption as may be loaded and shipped out of the county on tax day?

Thus, it is said in the opinion:

> "The fact that a portion of the plant had actually been shipped is not controlling as to that portion which was in the process of preparation for exportation, although there can be no question concerning the owner's intention to take it out of the country." (Opinion, pp. 8-9.)

We respectfully submit that reflection will show the error of this view. If all that the Constitution prohibited was taxation by a state after they had been loaded onto a common carrier, none of the evils would have been ended which it was the express object of the framers of the Constitution to eliminate.

The Supreme Court of the United States has consistently held that delivery to a common carrier is only evidence of committing goods to exportation. "But the same degree of certainty may exist though no common carrier is involved." *Richfield Oil Corp. v. State Board*, 329 U. S. 69, 82.

The integrated acts of Bigge, the railroad, and the steam-

ship company comprise the movement of the entire cement plant. The combination of all three was necessary.

[fol. 187] The overt acts in committing the entire cement plant cannot be compared to vicarious contentions to export. The exportation was definite, it was certain, and it was actually carried through without interruption.

III

Dismantling and Packaging Are Not the Same as Manufacturing or Growing Crops

The question has been put that if the trial Court were affirmed in this case that in many states there would be nothing but the lands and real estate to bear the taxes. "Some of the Western States produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern States." (Opinion p. 5.)

We have no argument with the decisions which do not exempt from taxation those articles which have not yet come into being. However, with respect to this point, attention is called to dicta in *Superior Oil Co. v. Mississippi*, 280 U. S. 390, which was quoted with approval in *Richfield Oil Co. v. State Board*, 329 U. S. 69, 82:

> "But it added, p. 396, 'Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion by showing the *manifest certainty of the destination* and exhibiting grounds of policy that are absent here.'"

[fol. 188] Can it be said that there was ever a case where manifest certainty of the destination was any clearer?

To manufacture an article is to unite miscellaneous component parts creating a unit distinguished from its component parts.

The cement plant had already been manufactured; it was complete and in existence and nothing remained to be done to bring it into existence.

The cement plant was sold as a complete operating cement plant in its existing form. Upon passage of title and delivery to the forwarding agent, nothing remained to be done except to ship it. To ship it required that it be put in suitable form for transportation which was as much a part of the transportation as the transportation itself.

IV

Delivery to Export Forwarding Agent Commits Goods to Export

Clark & Co. v. Clark, 3 Woods 408, is a case in principle very like this case, omitting the fact of the shipment of the 12%. There the County of Merced would contend that nothing had been done towards the export of the logs in question. They had been purchased by one citizen of Georgia from another and shipped to the place of business of the purchaser, where they were lying at the moment at which they were taxed. They had not started on any journey of export. But the man who bought them was an [fol. 189] exporter and engaged in no other business. The Court held that this rendered their export so certain that they had become exempt from tax as exports. If said: "Is the fact that they were still on land, though awaiting shipment such a circumstance as deprives them of their character as exports"? The Court said that it did not.

V

The Spalding Case

A. G. Spalding & Bros. v. Edwards, 262 U. S. 66, is a case where a firm in Venezuela ordered Scholtz & Co., commission merchants, in New York to buy for their account and risk a certain number of baseballs and baseball bats from Spalding. Scholtz & Co. ordered Spalding to pack for export and deliver the goods to the boat which was done and a receipt was taken from the carrier. The receipt was sent to Scholtz & Co. which exchanged it for an export bill of lading in their name. The transaction from start to finish was understood and intended by the plaintiff and Scholtz & Co. to be for the purpose of exporting the goods to the Venezuela company.

Justice Holmes delivered the opinion of the Court (pp. 69-70):

> "The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with [fol. 190] the direction to the foreign port upon the goods. The expected and accomplished effect of the act

was to start them for that port. *The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result.* Getting the bill of lading stands no differently from putting the goods on board ship. Neither does it matter that the title was in Scholtz & Co. and that theoretically they might change their mind and retain the bats and balls for their own use. There was not the slightest probability of any such change and it did not occur. The purchase by Scholtz & Co. was solely for the purpose of Delgado & Cia. and for their account and risk. *Theoretical possibilities may be left out of account.* In Railroad Commission of Louisiana v. Texas & Pacific Ry. Co., 229 U. S. 336, the consignees might have retained the goods at New Orleans instead of shipping them abroad. The fact that they came to New Orleans by rail from another place in the State made no difference. The same principle was applied in Texas & New Orleans R. R. Co. v. Sabine Tram Co., 227 U. S. 111, 123. The overt act of delivering the goods to the carrier marks the point of distinction between this case and Cornell v. Coyne, 192 U. S. 418. To put it at any later point would fail to give to exports the liberal protection that hitherto they have received; of which an example may be seen in Thames & Mersey Marine Ins. Co. v. United States, 237 U. S. 19."

[fol. 191]

VI

Substance, Not Form, Governs

A liberal construction has been accorded where it is found from the circumstances that export trade has been actually intended and carried through, and in such cases primary consideration is given matters of substance and not of form.

"For the purpose of determining whether petitioner was the importer in the constitutional sense, it is immaterial whether the title to the merchandise imported vested in him who caused it to be brought to this country at the time of shipment or only after its arrival here . . . For in determining the meaning and application of the constitutional provision, *we are concerned with matters of substance, not of form.* When the mer-

chandise is brought from another country to this, the extent of its immunity from state taxation turns on the essential nature of the transaction, considered in the light of the constitutional purpose, and not on the formalities with which the importation is conducted or on the technical procedures by which it is effected."

Hooven & Allison Co. v. Evatt, 324 U. S. 652, 662-663, 65 S. Ct. 870, 89 L. Ed. 1252.

See also to the same effect:

Carson Petroleum Co. v. Vial, 279 U. S. 95, 103, 48 S. Ct. 292, 73 L. Ed. 626;

In re Globe Varnish Company (C. C. A.), 114 Fed. (2d) 916.

[fol. 192] Conclusion

In conclusion, we again call attention to the fact that the contract which was entered into between Kaiser and the foreign purchaser Empresa called for the exportation of an entire cement plant from California to Colombia. An export license was issued by the Federal Government; Empresa paid for the entire cement plant; it employed an export forwarding agent which in turn employed a contractor to effect the exportation in the only manner possible under the circumstances. Upon the passage of title to Empresa the foreign purchaser, the export forwarding agent took possession and the contractor began dismantling and packaging operations. The dismantling, packaging and shipping continued without cessation from the time of the passage of title in January of 1945 until the entire cement plant, the subject matter of the contract between the seller and the foreign buyer, was completely exported. When Bigge began dismantling and packaging, the cement plant was completely committed to exportation. It was beyond the sellers power to prevent exportation because the seller no longer owned the cement plant. The fact that 14 carloads (12%) of the entire cement plant had been started on its journey by the tax day made it a certainty that the entire cement plant would be exported. 12% of a cement plant in Colombia had no value; 88% of a cement plant in the United States had no value. The cement plant had been paid for as had the contract for dismantling, packaging and shipping; all of which occurred more than two months prior to the tax day.

[fol. 193] It is respectfully submitted that if the mandate of the Supreme Court of the United States is to be observed that transactions be examined in the light of the constitutional provisions and the purpose of the Constitution, instead of by mere formality or technical procedure, the entire transaction was an export of an entire cement plant, a tax upon which either by the government of the United States or any State of the Union was specifically forbidden by the Constitution of the United States.

It is respectfully submitted that respondents' petition for a rehearing should be granted and that the judgment of the trial Court should be affirmed.

Dated, Oakland, California, June 29, 1948.

Respectfully submitted, Scott D. Kellogg, Raymond Salisbury, Betsy FitzGerald Rahn, Attorneys for Respondents and Petitioners.

[fol. 194] AFFIDAVIT OF MAILING

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

M. B. Dillon, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years and not a party to the action of "Empresa Siderurgica, S. A. vs. County of Merced" in the Supreme Court of the State of California, Sac. No. 5893;

That on June 30, 1948, she mailed by first class mail, postage prepaid, two copies of the respondents' petition for a rehearing, in the above entitled action, to Frank C. Hale, District Attorney, Court House, Merced, California; Frad N. Houser, Attorney General, James E. Sabine, Deputy; State Building, San Francisco, attorneys for appellants. The above are the last known addresses of said attorneys.

Affiant also mailed a copy of the above mentioned petition to Hon. Peter J. Shields, Court House, Sacramento, California, the judge who tried the cause.

M. B. Dillon.

Subscribed and sworn to before me this 30th day of June, 1948. Henry B. Lister, Notary Public in and for the City and County of San Francisco, State of California. (Seal.)

[fols. 195-196] [File endorsement omitted]

[fol. 197] IN THE SUPREME COURT OF CALIFORNIA

[Title omitted]

APPELLANTS' ANSWER TO RESPONDENTS' PETITION FOR A REHEARING—Filed July 7, 1948

To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Plaintiffs' petition for rehearing presents very little that has not already been discussed in the briefs on file. We [fol. 198] shall, therefore, be brief in our reply to the petition.

I. The Decision of This Court Is in Accord With the Decisions of the United States Supreme Court

Plaintiffs' assertions that the decision of this Court fails to follow "the plain teachings of the decisions of the United States Supreme Court" are not well founded. On the contrary the decision which has been rendered by this Court is completely in accord with the decisions of the United States Supreme Court.

The applicable rule is quoted in the opinion of this Court. This rule was stated many years ago in the case of *Coe v. Errol*, 116 U. S. 517, and was repeated as recently as last year in the case of *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69, 70. The rule is "that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey . . ."

As this Court has pointed out in its opinion, the stipulated facts clearly show that the property assessed was not exempt from taxation under the above quoted rule. It had not been delivered to a common carrier for transportation and it had not been shipped. It was still at the plant site and much of it had not even been dismantled.

[fol. 199] The decisions of the United States Supreme

Court relied upon by this Court in its opinion, clearly sustain the decision of this Court.

The case of *Clarke & Co. v. Clarke*, 3 Woods 408, cited by plaintiffs, is not a decision of the United States Supreme Court, but of a lower federal court. It was decided in 1877, nine years before the United States Supreme Court rendered its opinion in *Coe v. Errol*, 116 U. S. 517, in which the Court stated the applicable rule. The *Clarke* case was decided, therefore, without the benefit of the exposition of applicable principles which later appeared in *Coe v. Errol*. Moreover, in the *Clarke* case, unlike the present case, the property had been moved from the place of purchase.

II. The Spalding Case

Plaintiffs suggest that the opinion in *A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66, calls for a different result from that which this Court has reached. One sentence in that opinion completely distinguishes that case from the case before this Court. That sentence appears at page 70 of the opinion and reads as follows:

> "* * * *The overt act of delivering the goods to the carrier marks the point of distinction between this case and Cornell v. Coyne*, 192 U. S. 418 * * *" (Emphasis added.)

Here, the stipulated facts show that none of the property assessed had been delivered to the carrier (Atchison, Topeka & Santa Fe Ry. Co.).

[fol. 200] III. No Question of Valuation Is Presented

Plaintiffs make statements with respect to valuation which we believe do not require an extended answer. The short answer is that the question of valuation is not presented on this appeal. It was not raised in the protest which was filed when the tax was paid. It was not an issue in the trial Court. The question was not presented either by the pleadings or by the stipulation of facts.

IV. Exportation Had Not Commenced With Respect to the Property Assessed

In their petition for rehearing, plaintiffs reiterate the argument made in their brief that because part of the prop-

erty which was purchased by Empresa had been shipped out of the State by tax day, all of the property was exempt from tax, including that still standing in the county in an undismantled condition.

Plaintiffs argue that what they purchased was an entire operating cement plant, and that when any part of the property purchased had been shipped it all should be regarded as moving in export, even that which still was standing in an undismantled condition. The position contended for by plaintiffs is not supported by any decision of this Court or of the United States Supreme Court.

Moreover, while for purposes of convenience, the property sold was referred to in the contracts as the "cement plant", it included machinery, equipment, removable structures, removable facilities, spare parts, supplies and miscellaneous [fol. 201] items. (C. T. 42-45, 54.) It included such items as gasoline engines, a caterpillar tractor, motors, lathes, wiring supplies, hand tools, twine, furniture and welding equipment and supplies, to mention only a few. (Exhibit "5" of the Agreed Statement of Facts.) The reference "cement plant" also included certain machinery, equipment, structures, spare parts and supplies which at one time had been located at a certain quarry at Emory, California, but which, when the contract of sale was entered into, were located at the site of the main plant at Merced. (C. T. 42.)

Plaintiffs contend that there is an essential difference between the manufacture of property for export and the dismantling of property for export. However, plaintiffs fail to cite any authorities which support this contention. In both instances the property is in the process of preparation for export and has not yet acquired the status of an export. There is nothing in the opinions of the United States Supreme Court to indicate that a different result should obtain here if the property were manufactured for export so that plaintiffs could have an operating cement plant than if property were dismantled for export so that plaintiffs could have an operating cement plant. In either case, the exportation of the property would not commence until the property was shipped or entered with a common carrier for transportation.

Plaintiffs seek to have this Court hold, contrary to the well reasoned opinion which it has rendered, that property which had not been delivered to a common carrier for [fol. 202] transportation, which had not been moved from

the place of purchase and a substantial part of which still was standing in an undismantled condition on the plant site, nevertheless was in export on tax day. Plaintiffs have not cited and we are not aware of any decision of the United States Supreme Court which would justify such a result.

Conclusion

We respectfully submit that plaintiffs' petition for a rehearing should be denied.

Dated, July 6, 1948.

Respectfully submitted, Gregory P. Maushart, District Attorney of the County of Merced; Fred N. Howser, Attorney General of the State of California; James E. Sabine, Deputy Attorney General of the Stafe of California, Attorneys for Appellants.

[fol. 203] IN THE SUPREME COURT OF CALIFORNIA

In Bank

[Title omitted]

ORDER DENYING REHEARING—Filed July 8, 1948

Respondents' petition for a rehearing Denied.

Gibson, Chief Justice.

Dated Jul. 8, 1948.

[File endorsement omitted.]

[fol. 204] IN THE SUPREME COURT OF CALIFORNIA

Sacramento No. 5893

EMPRESA SIDERURGICA, S. A., a Corporation of Colombia, South America, and Vanderburgh & Co., Inc., a California Corporation, Plaintiffs and Respondents,

vs.

COUNTY OF MERCED, a Municipal Corporation, J. EMMETT McNAMARA, Assessor of the County of Merced, et al., Defendants and Appellants

On Appeal from the Superior Court in and for the County of Merced

JUDGMENT—June 15, 1948

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It Is Ordered, Adjudged, and Decreed by the Court that the Judgment of the Superior Court in and for the County of Merced, in the above entitled cause, be and the same is hereby reversed.

Appellants to recover costs on appeal.

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 15th day of June, 1948, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 16th day of July, A. D. 1948.

William I. Sullivan, Clerk, by L. F. White, Deputy.
(Seal.)

[fol. 205] [File endorsement omitted.]

[fol. 206] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENTS OF ERROR, AND PRAYER FOR REVERSAL—Filed August 19, 1948

To the Honorable Phil S. Gibson, Chief, Justice of the Supreme Court of the State of California:

Empresa Siderurgica, S. A., a corporation of Colombia, South America, and Vanderburgh & Co., Inc., a California corporation, appellants and plaintiffs in the above entitled cause, petition and represent as follows:

The decision of the Supreme Court of the State of California in the above entitled cause was filed with the Clerk of said Court on June 15, 1948. On June 30, 1948, a petition for rehearing in said case was duly presented and filed by appellants. On July 8, 1948, an order was made by the Supreme Court of the State of California in said [fol. 207] cause denying said petition for rehearing.

Considering itself aggrieved by the said final judgment of the Supreme Court of the State of California in the above entitled cause, said appellants, Empresa Siderurgica, S. A., a corporation of Colombia, South America, and Vanderburgh & Co., Inc., a California corporation, hereby pray that an appeal be allowed to the Supreme Court of the United States and for an order fixing the amount of bond.

Assignments of Error

The said appellants, Empresa Siderurgica, S. A., a corporation of Colombia, South America, and Vanderburgh & Co., Inc., a California corporation, assign the following errors in the record and proceedings in said cause:

(1) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in sustaining the validity of the California Revenue & Taxation Code, Division 1, as amended, construed, applied and enforced to impose a personal property tax upon a portion of an entire and complete cement plant here involved, as against appellants' contention that said Act, so construed, applied and enforced, is invalid under Article I, section 10, clause 2, of the United States Constitution.

(2) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the California Revenue & Taxation Code, Division I, as amended, when construed and applied to impose a personal property tax upon a portion of an [fol. 208] entire and complete cement plant committed and in the process of exportation to Colombia, South America, and which was so exported, is not invalid under and repugnant to the provisions of Article I, section 10, clause 2, of the United States Constitution.

(3) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the tax levied upon and collected from appellants, Empresa Siderurgica, S. A., a corporation of Colombia, South America, and Vanderburgh & Co., Inc., a California corporation, pursuant to the California Revenue & Taxation Code, Division I, as amended, was not an impost or duty on exports in violation of or repugnant to or within the meaning of Article I, section 10, clause 2, of the United States Constitution.

(4) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the preparation for export not only included: (a) the negotiations preceding the signing of the export sales contract; (b) the execution of the export sales contract; (c) the employment of the export forwarding agent; (d) the employment of Bigge; (e) the issuance of the export license; and (f) the establishment of the letter of credit; but also included: (g) the passage of title and delivery of the cement plant to the purchaser; (h) delivery of the cement plant to the export forwarding agent and its activities in contracting for the dismantling, packaging, loading, railroad cars, shipping space, preparation of [fol. 209] foreign documents, bills of lading and other activities; and (i) delivery of the cement plant to Bigge and its activities in dismantling, packaging and shipping; and only excepted that part of the plant which had been actually loaded on railroad cars and left the county on March 5, 1945.

(5) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in failing to give consideration or effect to:

(a) That the contract of November 11, 1944, between Empresa and Kaiser was an export sales contract.

(b) The provisions of the export sales contract which, among other things, required passage of title to purchaser and delivery of the entire and complete cement plant to the purchaser's forwarding agent upon payment therefor.

(c) The provisions of the export sales contract which, among other things, provided for the sale of an entire and complete cement plant and which by its terms was not divisible or severable.

(d) The provisions of the Bigge contract which, among other things, required Bigge upon taking possession of the cement plant to dismantle, package and load on railroad cars without interruption or cessation until the entire cement plant had been completely dismantled, packaged and shipped.

(e) The provisions of the Bigge Contract which, [fol. 210] among other things, provided for the preparation for shipment of an entire and complete cement plant and which by its terms was not divisible or severable.

(f) The issuance of an export license by the Foreign Economic Administration permitting the exportation of the entire and complete cement plant.

(g) The provisions of the letter of credit for the account of Banco de Bogota, Medellin, Colombia, South America, on behalf of appellant, Empresa Siderurgica, S. A., (the purchaser) for the balance of the purchase price of the entire cement plant which, among other things, required the presentation of the export license permitting the export of the entire cement plant to the Republic of Colombia, South America.

(h) The actual exportation of the entire cement plant to Colombia, South America, pursuant to the export sales contract, the Bigge contract, the export license and the letter of credit.

(6) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in failing

to give consideration or effect to the fact that the following are the usual, necessary and regular steps to effect the exportation of the entire cement plant:

(a) The export sales contract of November 11, 1944.

(b) The employment of an export forwarding agent on December 2, 1944.

[fol. 211] (c) The Bigge contract of December 2, 1944.

(d) The issuance of an export license by the U. S. Foreign Economic Administration on December 15, 1944.

(e) The issuance of a letter of credit in payment of the entire cement plant on January 3, 1945.

(f) The passage of title and delivery to the foreign purchaser on January 3, 1945.

(g) The delivery of the entire cement plant to the export forwarding agent on January 3, 1945.

(h) The delivery of the entire cement plant to Bigge on January 3, 1945.

(i) The integrated operation of the export forwarding agent in preparing foreign documents, bills of lading, negotiations for shipping space by rail and sea; the dismantling, packaging and loading on railroad cars by Bigge; the movement of the railroad cars to the seaboard; and the loading on the steamships at the seaboard which carried the entire cement plant to its foreign destination; all of which commenced on January 3, 1945, and continued without interruption or cessation until the whole of the cement plant left the United States on January 29, 1946.

(j) That the entire cement plant was actually exported.

(7) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the export sales contract was effective [fol. 212] and operative as a matter of law to sever and change the entire cement plant from real property to personal property, which was so assessed as personal property

by the County of Merced, but was not effective operative as a matter of law as the first step in and the commencement of the exportation of the said cement plant.

(8) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the passage of title of said cement plant to purchaser and the delivery of the cement plant to the purchaser, purchaser's export forwarding agent and Bigge, pursuant to the export sales contract, occurred prior to the commencement of exportation of said cement plant.

(9) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that delivery to the export forwarding agent on January 3, 1945, pursuant to the export sales contract and coupled with the subsequent acts of complete exportation of the entire cement plant, was not the equivalent of delivery to a common carrier for transportation.

(10) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that delivery to Bigge Drayage Co. on January 3, 1945, pursuant to its contract with the export forwarding agent, dated December 2, 1944, coupled with its subsequent acts of dismantling, packaging and shipping the entire cement plant to the foreign destination, was not equivalent to delivery to a common carrier for transporta-
[fol. 213] tion.

(11) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that no exportation of the cement plant commenced until the parts thereof were loaded on the cars of a railroad common carrier.

(12) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the property owner's argument that because 12% of the plant had been shipped out of the county and was clearly an export, the remaining 88%, whether dismantled and packaged or not, was likewise an export, cannot be sustained.

(13) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the integrated activities of the export for-

warding agent and Bigge was an intention to export rather than a commencement of exportation.

(14) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the fact that a portion of the cement plant had actually been shipped, is not controlling as to that portion which is in the process of preparation for exportation, although there can be no question concerning the owner's intention to take it out of the country.

(15) The Supreme Court of the State of California erred in its final judgment in the above entitled cause, in its de-
[fol. 214] termination that the trial judge erred when he held, as a matter of law, that when the goods have been committed to exportation, a tax imposed upon them amounts to taxation of an export.

(16) The Supreme Court of the State of California erred in its final judgment in the above entitled cause, in its determination that the trial judge erred in holding that "proceeding to change . . . (the plant) from parts in place of a complete building, into a mass of disconnected materials made the completion of the exportation economically imperative. This was not a mere preparation of the plant for exportation; by such action and change the parts had been started upon such transportation" with the degree of certainty demanded by Coe v. Errol, (116 U. S. 517) and the many cases which have endorsed it."

(17) The Supreme Court of the State of California erred in its final judgment in the above entitled cause, in its determination that on March 5, 1945, the statutory date for the assessment of the personal property for the tax year 1945-46, the portion of the entire and complete cement plant being dismantled and packaged, was not committed to exportation within the meaning of Article I, section 10, clause 2, of the United States Constitution.

(18) The Supreme Court of the State of California erred in its final judgment in the above entitled cause, in its determination that the tax levied upon appellants was not invalid, illegal or unenforceable and was not contrary to, or in violation of, the provisions of Article I, section 10, clause 2, of the Constitution of the United States, because
[fol. 215] said tax was levied on the portion of the cement

plant which had not been loaded on the cars of a railroad common carrier.

(19) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the scope and effect of United States Constitution, Article I, section 10, clause 2, permits or requires different results as to the validity of a tax upon exports when (a) the goods are delivered for exportation to the foreign purchaser, purchaser's export forwarding agent and contractor, and (b) when the goods are delivered for exportation to a railroad common carrier.

(20) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in reversing the judgment of the Superior Court of the State of California.

Prayer for Reversal

For which errors, appellants, Empresa Siderurgica, S. A., a corporation of Colombia, South America, and Vanderburgh & Co., Inc., a California corporation, pray that the said judgment of the Supreme Court of the State of California, dated June 15, 1948, in the above entitled action be reversed and a judgment rendered in favor of the said appellants, and for costs.

Dated: August 19th, 1948.

Scott D. Kellogg, Attorney for Appellants.

[fol. 216] [File endorsement omitted]

[fol. 217] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed August 19, 1948

Empresa Siderurgica, S. A., a corporation of Colombia, South America, and Vanderburgh & Co., Inc., a California corporation, having prayed for an allowance of an appeal to the Supreme Court of the United States from the final judgment rendered by the Supreme Court of the State of California in the above entitled cause and having presented and filed their petition for appeal, assignments of error and prayer for reversal, and a statement as to jurisdiction

on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided.

It is now ordered that an appeal be and the same is hereby allowed in the above entitled cause as provided by law, from [fols. 218-219] the Supreme Court of the State of California to the Supreme Court of the United States; and

It is further ordered that the Clerk of the Supreme Court of the State of California prepare and certify a transcript of the record in this cause, as may be designated by the appellants and appellees, and transmit the same to the Supreme Court of the United States so that the Clerk of said Court shall have said record within sixty days from this date; and

It is further ordered that security for costs on appeal be fixed in the sum of $500.00, and that upon approval of bond in said amount all further proceedings in the above entitled cause shall be stayed until final determination of said appeal.

Dated: August 19, 1948.

Douglas L. Edmonds, Acting Chief Justice of the Supreme Court of the State of California.

[fols. 220-222] Citation in usual form filed Aug. 19, 1948, omitted in printing.

[fols. 223-224] Bond on appeal for $500.00 approved and filed Aug. 19, 1948, omitted in printing.

[fol. 225] [File endorsement omitted]

[fol. 226] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR TRANSCRIPT ON APPEAL TO SUPREME COURT OF THE UNITED STATES—Filed August 19, 1948

To the Supreme Court of the State of California and to the Clerk thereof:

On behalf of Empresa Siderurgica, S. A., a corporation of Colombia, South America, and Vanderburgh & Co., Inc., a California corporation, appellants, it is requested that

you prepare and certify the transcript of record on appeal to the Supreme Court of the United States in the above entitled cause and the following are hereby designated to be included in said transcript:

1. Clerk's transcript on appeal as filed in Supreme Court of the State of California.

2. Proceedings in Supreme Court of the State of Cali-
[fol. 227] fornia.

3. Petition for allowance of appeal, assignments of error and prayer for reversal.

4. Statement of jurisdiction on appeal.

5. Order allowing appeal.

6. Bond on appeal.

7. Citation on appeal.

8. Praecipe for transcript on appeal.

9. Appellants' notice to appellees of appeal and statement directing appellees' attention to paragraph 3, rule 12, Rules of Supreme Court of the United States.

10. Proof of service on appellees of preceding documents designated as numbers 3 to 9, inclusive.

11. All statements and motions required and permitted to be filed under rule 12 of Rules of the United States Supreme Court.

Dated: August 19, 1948.

Scott D. Kellogg, Attorney for Appellants.

[fol. 228] [File endorsement omitted]

[fol. 229] IN THE SUPREME COURT OF CALIFORNIA

[Title omitted]

STIPULATION—Filed September 22, 1948

It is hereby stipulated that that portion of the opinion of the trial court appearing at page 143 of the transcript, line 3, which now reads "March 5, 1944", should read "March 5, 1945".

It is further stipulated, therefore, that the Clerk of the Supreme Court of California in certifying the record in

the above entitled action may correct the transcript at page 143, line 3, to read "March 5, 1945" instead of "March 5, 1944".

Dated: September 22, 1948.

Scott D. Kellogg, Attorney for Plaintiffs & Respondents. Fred N. Howser, Attorney General of the State of California; James E. Sabine, Deputy Attorney General of the State of California; Gregory P. Maushart, District Attorney of the County of Merced, by James E. Sabine, Deputy Attorney General, Attorneys for Defendants & Appellants.

[fols. 230-235] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 236] In the Supreme Court of the United States

Statement of Points on Which Appellants Intend to Rely, and Designation of Record—Filed September 29, 1948

In compliance with Paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States, Appellants, Empresa Siderurgica, S. A. and Vanderburgh & Co., Inc., hereby adopt each and every of its assignments of error as its statement of points intended to be relied upon by Appellants.

In further compliance with Paragraph 9 of Rule 13 of the Rules of The Supreme Court of the United States, Appellants, Empresa Siderurgica, S. A., and Vanderburgh & Co., Inc., think the entire record of the above entitled cause, as certified by the Clerk of the Supreme Court of California, is necessary for the consideration of the points upon which Appellants intend to rely; and accordingly Appellants, Empresa Siderurgica, S. A., and Vanderburgh & Co., Inc., designate that the entire record, as certified by [fols. 237-238] the Clerk of the Supreme Court of the State of California, shall be printed by the Clerk of the Supreme Court of the United States.

Dated: September 21, 1948.

Scott D. Kellogg, Attorney for Appellants.

Proof of Service of Papers on Appellees

Service is hereby acknowledged on this 21st day of September, 1948, of the following in the above entitled cause:

Statement of Points on Which Appellants Intend to Rely, and Designation of Record.

Gregory P. Maushart, District Attorney of the County of Merced; Fred N. Howser, Attorney General of the State of California; James E. Sabine, Deputy Attorney General of the State of California, Attorneys for Appellees.

[fol. 239] Supreme Court of the United States

Order Noting Probable Jurisdiction—November 8, 1948

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: Enter Scott D. Kellogg. File No. 53,329, California, Supreme Court, Term No. 327. Empresa Siderurgica, S. A., a Corporation of Colombia, South America, et al., Appellants, vs. County of Merced, a Municipal Corporation, J. Emmett McNamara, Assessor of the County of Merced, et al. Filed September 29, 1948. Term No. 327 O.T. 1948.

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SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 327

EMPRESA SIDERURGICA, S. A., A CORPORATION OF COLOMBIA, SOUTH AMERICA, AND VANDERBURGH & CO., INC., A CALIFORNIA CORPORATION,

Appellants,

vs.

COUNTY OF MERCED, A MUNICIPAL CORPORATION, J. EMMETT McNAMARA, ASSESSOR OF THE COUNTY OF MERCED, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT AS TO JURISDICTION

SCOTT D. KELLOGG,
Counsel for Appellants.

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United States v. *County of Allegheny*, 322 U. S. 174 8
United States v. *Hvoslef*, 237 U. S. 1 8
Whitfield v. *Ohio*, 297 U. S. 431 10
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STATUTES CITED

California Revenue and Taxation Code:
Section 103 5
Section 106 5
Section 201 5
Section 202 5
Section 405 5
California Rules on Appeal, Rule 24 6
Constitution of the United States, Article I, Section 10, Clause 2 6, 7
Judicial Code, Section 237(a), as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U. S. C. A. 344(a), 861(a)) 5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 327

EMPRESA SIDERURGICA, S. A., A CORPORATION OF COLOMBIA, SOUTH AMERICA, AND VANDERBURGH & CO., INC., A CALIFORNIA CORPORATION,

Appellants;

vs.

COUNTY OF MERCED, A MUNICIPAL CORPORATION, J. EMMETT McNAMARA, ASSESSOR OF THE COUNTY OF MERCED, ET AL.,

Appellees.

STATEMENT AS TO JURISDICTION

Statement of Federal Question Involved in the Appeal

The question presented by this appeal is whether the California Revenue & Taxation Code, Division I, as amended, construed, applied and enforced, to permit and require a personal property tax upon a portion of an entire and complete cement manufacturing plant which, on the first Monday in March (March 5, 1945), was being exported from California to Colombia, South America, and which

was so exported, is repugnant to Article I, section 10, clause 2 of the Constitution of the United States.

Statement of the Case

In November, 1944, appellant Empress Siderurgica, S. A., a corporation of Medellin, Colombia, South America, entered into a contract to purchase a cement manufacturing plant known as the Yosemite Portland Cement Plant. (Tr. 34-35, 42-53) [1] The contract provided for the passage of title to the entire cement plant upon the occurrence of two conditions; namely, (1) the issuance of an export license by the federal government, and (2) the establishment of a letter of credit in payment. The contract also provided for the employment of an export forwarding agent to effect the exportation of the entire cement plant. (Tr. 37, 48)

Pursuant to the contract, appellant Vanderburgh & Co., Inc., an export forwarding agent, was employed. (Tr. 35) Vanderburgh employed Bigge Drayage Co., a contractor and a licensed common carrier by motor vehicle in interstate and foreign commerce, to dismantle, package and deliver the cement plant to the railroad carrier. (Tr. 35, 54-75)

On December 15, 1944, the U. S. Foreign Economic Administration issued Export License SP No. 2086 (Tr. 38, 104) and on January 3, 1945, the letter of credit was established covering the balance of the purchase price. (Tr. 38, 105-109) Thereupon, on January 3, 1945, title passed pursuant to the contract, and the entire cement plant was delivered to purchaser, the export forwarding agent, and Bigge, at which time dismantling, packaging and shipping operations commenced. (Tr. 39)

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[1] References to the facts stated, unless otherwise noted, will be to the pages of the typewritten Clerk's Transcript on Appeal, upon which the case was reviewed by the Supreme Court of California, and which is included in the transcript certified to this Court.

From the date of passage of title to appellant Empresa Siderurgica, S. A. on January 3, 1945, to the date when the last of the cement plant left the United States on January 29, 1946, the respective activities of the export forwarding agent, the contractor, the railroad carrier, and the steamship carrier, consisted of one integrated and continuous operation in effecting the exportation of the entire and complete cement plant. (Tr. 39, 41)

On March 5, 1945, while the exportation was being carried out and after 14 carloads of the cement plant had left Merced County, the Assessor of said County assessed a personal property tax on the whole of the cement plant. (Tr. 39-40, 112) Thereafter, when appellants pointed out to the Assessor and District Attorney of Merced County that 14 carloads were out of the County on the tax date, the Assessor and District Attorney requested the Board of Supervisors to correct the Assessment roll reducing the assessment by 12%, which was done. (Tr. 40-41, 117) Then, on August 31, 1945, the appellants paid the tax of $7,999.20 under protest, a copy of the protest being attached to the Complaint as Exhibit "A". (Tr. 40, 12-22, 116) Thereafter, appellants instituted this suit in the Superior Court of the State of California in and for the County of Merced to recover the tax paid. (Tr. 41, 1-11)

The County and the Assessor thereof filed an answer to the Complaint admitting all of the averments other than that the property assessed was in interstate or foreign commerce and was an export. (Tr. 23-27)

The case was tried on a stipulation and agreed statement of facts. (Tr. 33-41)

Opinions Below

The trial court rendered an opinion (Tr. 134-146, a copy of which is attached as Appendix "A") in which the court

determined that on the tax assessment day, the entire plant was an export, and entered Findings of Fact (Tr. 149-151) from which the court made the following Conclusions of Law (Tr. 151-152):

"I

"That on March 5, 1945, the proposed exportation of the cement plant was in process of execution and that before and on that day the plant and the parts thereof were moving or being made to move toward Colombia, South America.

"II

"That on March 5, 1945, the cement plant and the parts thereof were so definitely committed to exportation and had advanced so far in the execution of a planned and finally accomplished exportation that its taxation was prohibited by Article I, Section 10, Clause 2 of the Constitution of the United States.

"III

"That the attempted taxation of the cement plant and the parts thereof as attempted by defendants was without authority of law and void under the provisions of the Constitution of the United States."

Judgment was entered accordingly for appellants.

The appellees duly appealed to the Supreme Court of California. The Federal questions herein considered were urged in the briefs of both parties.[2]

On June 15, 1948, the Supreme Court of California rendered its decision in bank reversing the judgment of the Superior Court. This decision has not yet been officially reported. It is unofficially reported in 32 A.C. 95 and 194 P. 2d (Adv.) 527. A copy of said opinion is attached hereto as Appendix "B".

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[2] Under the California practice, there is no assignment of error; the questions presented are set forth only in the briefs.

Statutory Provisions Sustaining Jurisdiction

The statutory provisions believed to sustain the jurisdiction of this Court is Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U. S. C. 344 (a), 861a).

State Statute Involved

The statute of the State of California, the validity of which is involved, is the California Revenue and Taxation Code, Division I, entitled "Property Taxation", enacted 1939, as amended and in effect on March 5, 1945.

The pertinent sections of the Code involved in this appeal are set forth as follows:

> "Section 201. All property in this State, not exempt under the laws of the United States or of this State, is subject to taxation under this code."
>
> "Section 103. 'Property' includes all matters and things, real, personal, and mixed, capable of private ownership."
>
> "Section 106. 'Personal property' includes all property except real estate."
>
> "Section 405. Annually, the assessor shall assess all the taxable property in his county, except State assessed property, to the person owning, claiming, possessing, or controlling it at 12 o'clock meridian of the first Monday in March. . . ."[3]
>
> "Section 202. The exemption of the following property is as specified in section 1 of Article XIII of the Constitution:
>
> . . . . . .
>
> "(c) Property that is exempt under the laws of the United States."[3]

[3] There are other provisions in Sections 202 and 405 which are not set out because not applicable to any of issues involved in the case.

Date of Judgment and Application for Appeal

The decision of the Supreme Court was filed on June 15, 1948. Under the California Rules on Appeal, the appellants had fifteen days within which to petition for a rehearing (Rule 27 (b)), and appellants duly filed its petition on the 30th day of June, 1948. On July 8, 1948, the Supreme Court denied a rehearing and the decision became final. See:

Rule 24 of California Rules on Appeal;

Richfield Oil Corp. v. *State Board*, 329 U. S. 69, 72-74.

The application for appeal was presented August 19, 1948.

Raising the Federal Question

The complaint in the trial court, in addition to incorporating the protest filed at the time the tax was paid under protest, (in which appellants asserted that the California Statute if construed, applied or enforced in such manner as to impose a tax on the said cement plant was in contravention of the provisions of Article I, Section 10, Clause 2 of the Constitution of the United States, Tr. p. 14) directly averred in Paragraph XI:

> "That the said tax was and is an unlawful tax on the personal property of Plaintiffs and was illegally levied and placed upon the tax roll of the said County of Merced under color of law therefor. That the imposition of the said personal property tax is an untax on the following grounds:
>
> "(1) That the property assessed by this said personal property tax and for which payment under protest was made as aforesaid, was at the time of the assessment of this tax and ever since has been an export and as such was and is exempt from taxation by the State of California and or the County of Merced under the provisions of Article I, Section 10, Clause 2 of the Constitution of the United States,

which prohibits taxation of exports by the states; and the said property was not properly subject to taxation by the State of California and or the County of Merced under Article XIII, Section 1 of the Constitution of the State of California and Section 202 of the Revenue and Taxation Code of the State of California. . . .

"(2) That the property assessed by this personal property tax and for which payment under protest was made, as aforesaid, was at the time of assessment of this tax in the hands of a common carrier and was and is property or commodities entered and moving in the course of transportation in foreign commerce, and as such, was and is exempt from taxation by the State of California and or the County of Merced under the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States and under Article XIII, Section 1 of the Constitution of the State of California, and Section 202 of the Revenue and Taxation Code of the State of California; and that such taxation constituted and does constitute an interference with goods entered and moving in the course of foreign commerce." (Tr., pp. 6-8.)

In the final decision of the Supreme Court of the State of California, it is said:

". . . Empresa maintains that, at the time of the assessment, the plant was an export. . . ."

* * * * * * * * *

"Article I, section 10, clause 2, of the Constitution of the United States provides: 'No State shall without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports. . . .' The trial judge determined, as a matter of law, that when the goods have been committed to exportation, a tax imposed upon them amounts to taxation of an export."

* * * * * * *

"The property owner's argument that because 12% of the plant had been shipped out of the county and was clearly an export, the remaining 88%, whether dismantled and packaged or not, was likewise an export, cannot be sustained."

Empresa Siderurgica v. *County of Merced*, 32 A. C. 95; 194 P. 2d (Adv.) 527.

Cases Believed to Sustain Jurisdiction

Richfield Oil Corp. v. *State Board*, 329 U. S. 69, 74;

Gulf Refining Co. v. *United States*, 269 U. S. 125, 136;

Standard Oil Company v. *Johnson*, 316 U. S. 481, 482-483;

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 289;

First National Bank v. *Anderson*, 269 U. S. 341, 345-346;

U. S. v. *County of Allegheny*, 322 U. S. 174, 192;

Chicago, etc., Co. v. *Perry*, 259 U. S. 548, 551;

Sully v. *American National Bank*, 178 U. S. 289, 298;

Hickox v. *State of Mississippi*, 292 U. S. 393, 394;

Whitfield v. *Ohio*, 297 U. S. 431, 435-436.

Statement of Grounds upon Which it Is Contended the Questions Involved Are Substantial

The final decision of the California Supreme Court based its conclusion that the statute as construed was not repugnant to the Constitution upon 4 grounds:

(1) Delivery of possession to export forwarding agent was not the equivalent of delivery to a common carrier for transportation.

(2) Delivery of possession to Bigge was not the equivalent to delivery to a common carrier for transportation.

(3) Appellants' argument that because 12% of the plant had been shipped out of the country and was clearly an export, the remaining 88%, whether dismantled and packaged or not, was likewise an export, cannot be sustained.

(4) The fact that a portion of the plant had actually been shipped is not controlling as to that portion which was in the process of preparation for exportation, although there can be no question concerning the owner's intention to take it out of the country.

All four of the above referred to grounds are based upon only one basic conclusion:

That there must be delivery to a common carrier before the cement plant or any part thereof becomes an export.

It is submitted that all four grounds as well as the basis therefor are erroneous and contrary to the unbroken line of decisions of this Court.

The decision of the California Supreme Court that there must be delivery to a common carrier before the cement plant or any part thereof becomes an export would practically destroy the constitutional prohibition against state taxation of exports.

If this decision be allowed to stand and thus to establish the law that the exportation of goods, sold under a contract calling for their exportation, has not commenced until the goods have been completely loaded on the cars of a railroad common carrier which is to transport them to the seaboard for shipment abroad, it is apparent that the constitutional inhibition against State taxation of exports is of no practical value. Such a rule would defeat the very object sought to be effected by the Constitution. If, as held by the opinion of the California Supreme Court, goods are not in the process of exportation until after they have been first loaded on the cars of a common carrier, any state, although the goods

were in the process of exportation, could, as they did before the Constitution, levy any taxes on goods not actually loaded on a common carrier. See:

Richfield Oil Corp. v. *State Board*, 329 U. S. 69, 76-78;
United States v. *Hvoslef*, 237 U. S. 1, 13;
Fairbank v. *United States*, 181 U. S. 283, 292-293;
Thames & Mersey Ins. Co. v. *United States*, 237 U. S. 19, 27.

The decision of the Supreme Court of California is contrary to the unbroken line of decisions of this Court that the exportation of goods commences with their first movement towards the sea. See:

Richfield Oil Corp. v. *State Board*, 329 U. S. 69, 81;
A. G. Spalding & Bros. v. *Edwards*, 262 U. S. 66, 68-69.

The decision of the Supreme Court of California is also contrary to the unbroken line of decisions of this Court that the law is not concerned with the means of shipment where the means chosen guarantee continuity of the export and foreign delivery in good faith and the Constitutional prohibition gives immunity from taxation to the process of exportation and to the transactions and documents embraced in that process. See:

Richfield Oil Corp. v. *State Board*, 329 U. S. 69, 81-82, 83;
Willcuts v. *Bunn*, 282 U. S. 216, 228.

The trial court found the facts to be as stated in the Stipulation and Agreed Statement of Facts upon which the case was tried; that the cement plant was purchased by appellant Empresa, a Colombian (South America) corporation; that it was purchased for the purpose of exporting it to Colombia, and it was finally so exported. That in pursuance of its purpose to export the cement plant, the appellant Empresa paid for the cement plant and took possession; employed an export forwarding agent; employed Bigge Drayage Co.

to dismantle the cement plant and attend to its shipment; obtained an export license; and that prior to March 5, 1945, part of the plant had already been shipped and the balance was in the process of exportation. (Tr. 149-151, 33-41).

From these facts and applying the rules set forth in the then recent case of *Richfield Oil Corp.* v. *State Board* (329 U. S. 69) the trial court concluded in its written opinion that the exportation of the cement plant commenced when the appellants took delivery and Bigge began dismantling the building. (Tr. 143).

It is submitted that this view is correct and in accord with the decisions of this Court. Further, the opinion of the Supreme Court of California entirely ignored the essential character of the transaction.

The Constitution prohibits a tax upon an export without regard to the technical procedures by which it is effected and the question as to whether goods are exports is to be determined from an examination of the entire transaction, the substance, not the form, controls. See:

Richfield Oil Corp. v. *State Board*, 329 U. S. 69, 83;
A. G. Spalding & Bros. v. *Edwards*, 262 U. S. 66, 69-70;
Hooven & Allison Co. v. *Evatt*, 324 U. S. 652, 662-663;
Carson Petroleum Co. v. *Vial*, 279 U. S. 95, 103.

The Federal Question Involved Is One of Vital Public Interest

While the amount sought in the suit involves a tax of principal and interest of over $8,000, there is pending and awaiting final determination of this suit, a sales tax based on the sale price of the cement plant which is approximately double the aforementioned amount.

But of far greater importance to the public is the fact that the decision must affect every future export sale in all of the States.

Conclusion

It is respectfully submitted that the federal question involved is substantial and of exceptional public interest and importance; and that this Court has jurisdiction of the appeal.

Dated: Oakland, California, August 19, 1948.

Respectfully submitted,

SCOTT D. KELLOGG,
Counsel for Appellants,

Appendix "A"

DECISION OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF MERCED

January 31, 1947.

PETER J. SHIELDS, *Judge:*

The Plaintiff, a corporation existing and located in Colombia, South America, entered into a contract with the Henry J. Kaiser Co. on November 11th, 1944, for the purchase for exportation of a cement plant located in Merced County, California. The plant was complete and fully equipped for immediate operation in the manufacture of cement. In preparation for this export the plaintiff on December 2, 1944 employed Vanderburgh & Co., Inc., a California corporation, as its forwarding agent to effect its contemplated export. On the same day Vanderburgh & Co., Inc., employed the Bigge Drayage Co. to dismantle the plant and to take the first steps looking to its shipment to its purchaser in South America.

On December 15th, 1944 a license was obtained from the United States Foreign Economic Administration approving the export of this property as contemplated by the parties. The entire sale was made contingent upon the issuance of this license.

On January 3rd 1945 the Henry J. Kaiser Company was advised that a credit had been opened in their favor for the account and on behalf of plaintiff thus effecting full payment for the plant.

On the same day, January 3, 1945, Vanderburgh & Co., Inc. and the Bigge Drayage Co. entered into possession of the property and began dismantling and crating it preparatory to shipment. This work proceeded until on March 5th, 1945, the date upon which personal property taxes are levied in California, the County of Merced levied a tax upon the parts of the cement plant which were then in that County. This tax was paid by plaintiff under protest and this is an action brought for its recovery. On the 5th day of March, the day upon which the tax was levied the condition of the

plant resulting from plaintiffs work of demolition and shipment was as follows:

1. 12% of the plant had been torn down, crated and shipped away.

2. 10% had been dismantled, crated and made ready for shipment.

3. 34% had been dismantled but not crated and its parts were lying about the premises.

4. 44% not dismantled; standing in place.

By January 18, 1946 the entire plant had been shipped out of Merced County and by January 29th following the entire plant had been shipped out of the State of California and out of the United States. The sole question for decision in this case is, had the entire property of the cement plant become "export" prior to March 5th, 1945 or did the part of it which remained in Merced County on that day retain its character as part of the general property of the County?

Many cases have been decided relative to this question as it arose under the Commerce Clause of the Constitution. But in the very recent case of Richfield Oil Company *v.* State Board of Equalization, not yet reported, but decided November 25, 1946, the Court felt compelled to state "There are few decisions of the Court under Article 1, Section 10, Clause 2 (of the Federal Constitution) which illuminate the problem". The question is at what moment does any portion of the general property of the State which may be intended for export or for the exportation of which a contract has been made becomes "export" and ceases to be such general property and exempt from local taxation. This is substantially a question of fact and in determining it the Courts are not concerned with mere formalities but by matters of substance. The very early case of Coe *v.* Errol, 116 U. S. 517 which involved the commerce clause of the Constitution but which stated a rule which has been adopted as a measure where the Export-Import clause was in question, to the effect that "goods do not cease to be part of the general mass of property, in the State, subject as such to its jurisdiction, and to taxation in the usual way until they

have been shipped or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey."

This rule has been so universally established that citations supporting it are unnecessary. It is enough to say that it was approved and applied in the Richfield case above cited. The delivery of goods to common carriers mentioned in the *Coe v. Erroll* case are not ends in themselves; the ultimate fact in all of these cases is, had the thing which has been done in the execution of the undertaking or contract of export resulted in committing the goods so definitely to export that the power of the exporter to defeat it is ended and that the goods may be said beyond any reasonable probability to have been so committed to exportation that there is a substantial certainty that their export will be completed. All of the cases require that something must have been done in furtherance of the export by which it can be said that the goods have "been started upon" transportation. Some of the cases say that commerce does not begin until actual delivery has been made to a common carrier. But this is not essential. Such delivery is only one of the ways in which the devotion of goods to export may be accomplished.

"The certainty that goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved" Richfield Oil Corp. *v.* State Board of Equalization, above.

In cases where delivery of the goods to a common carrier has been made, as stated by Chief Justice Taft, the decision is easy. "It is much more difficult" where the movement has been attended by other circumstances, or effected by other means.

Hughes Bros. v. Minnesota, 272 U. S. 469.

The question always remains, were the goods at the time a tax upon them is attempted, so definitely committed to export that the parties to the transaction have lost the power to recall the goods or to devote them to a domestic use. There is no hard and fast rule by which the character of goods claiming the protection of Article 1, Section 10

Clause 2 of the Constitution can be unfailingly tested. Under this provision "we are concerned with matters of substance, not of form—the extent of its (the goods) immunity from state taxation turns on the essential nature of the transaction considered in the light of the Constitutional purpose and not on the formalities with which the importation (exportation) is conducted" Hooven *v.* Evatt 324 U. S. 652, Western Oil Co. *v.* Liscome 244 U. S. 346, where the Court say "as this Court often has said it is the essential character of commerce—that is decisive".

In considering what so committed goods intended for export to a condition which it was held that their exportation was made reasonably certain many circumstances have been held to be sufficient which were less persuasive than the facts in this case.

In Clarke *v.* Clarke, 3 Woods, 408, logs collected by a Georgia exporter and purchased for export, while still in port on the land in his possession and not sold at the time the tax was levied were held exempt where the logs had been subsequently exported. It will be noted that the logs had not been actually exported they had not even been sold for export, but the circumstances showed that they had definitely been devoted to exportation. In Texas Co. *v.* Sabine Tram Co. 227 U. S. 111, lumber was shipped to a small seaport town. It was purchased for export but it had not been sold and no particular lumber set apart for any prospective purchaser but was selected and loaded as vessels arrived. The fact that the town was very small and the lumber far beyond its economic needs was given consideration in determining the improbability that the lumber would not be exported. In Hughes Bros. *v.* Minnesota the Court considered the fact that if a change of purpose to export was made, that it would involve a breach of contract. The Hughes Bros. case is relevant here in another way. In that case pulp wood logs had been sold in Minnesota for transport to another state, the transportation to be made by floating the logs down a small river to its connection with another. In preparation for the delivery the timber was logged and the logs taken down to the stream and placed, some of them on the ice and the balance on the bank, awaiting the breaking up of the ice. The ice broke April 29th

"when the drive of the logs began, those on the ice moved by themselves and those on the bank were pushed in". The decision does not state how long it took to "push" in the logs. There were 10,000 cords of these logs and it is quite improbable that they had all been floated before May 1st which was the day upon which they were attempted to be taxed. No question of dividing the tax was raised; it seemed to be conceded that the movement of some of the logs was a beginning of a movement of them all. This would be determinative of the tax in the case before me so far as the ten per cent of the plant which was crated was concerned. When the twelve per cent was shipped it was part of a movement of all the rest, like the logs on the bank, which was crated and ready for shipment as transportation could be had.

It is an admitted fact in this case that the contemplated export of this plant was finally completed. "There has been a liberal construction of what is continuity of the journey in cases where the Court finds from the circumstances that export trade has been actually intended and carried through" Carson *v.* Vial 279 U. S. 95, 103.

The rule of decision announced in Hughes Brothers *v.* Minnesota is singularly applicable to the case under discussion. There as hereinbefore stated certain logs had been sold for delivery by floating to another state. The logs had been taken to the bank of the stream where some of them had been placed on the ice and the remainder had been piled on the banks. The question was whether or not the logs had become the subject of interstate commerce before the levy of a certain tax upon them. In the course of its decision the Court said: "The conclusion in cases like this must be determined from the various circumstances. Mere intention by the owner ultimately to send the logs out of the state does not put them in interstate commerce, nor does preparatory gathering for that purpose at a depot. It must appear that the movement for another state has actually begun and is going on. Solution is easy when the shipment has been delivered to a carrier for a destination in another state. It is much more difficult when the owner retains complete control of the transportation and can change his mind and divert the delivery from the intended interstate destination

as in the Champlain Co. case. The character of the shipment in such a case depends upon all of the evidential *circumstances looking to what the owner has done in the preparation for the journey and in carrying it out.*

The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if the other facts show that the journey has already begun in good faith and temporary interruptions of the passage is reasonable and in furtherance of the intended transportation as in the Champlain Co. case.

Elsewhere in the opinion it is said: "The contract and the method of complying with it are all circumstances however throwing light on the question whether the transportation in interstate commerce (in our case exportation) began".

In cases like this where goods have been purchased for exportation and action has been taken in execution of that purpose it is not a question of whether any particular thing has been done, but of whether or not what has been done in furtherance of a contract of export has so far committed the goods to exportation that there is no reasonable probability that the proposed export will not be concluded; that there remains no reasonable question or hypothesis upon which their exportation can be doubted. I think that it can be said that when the tax was levied upon the materials in this case that it had become substantially certain that the mechanisms constituting the plant would be exported, as they subsequently were. This seems unquestionable when the facts as they existed March 5, 1944 (1945) are viewed from their several angles:

1. The materials of the plant became committed to export when the Bigge Company began dismantling the building. At that time the plaintiff had spent a great deal of time and effort in furtherance of his intention to export the whole plant. The firmness of its intention to export this property is shown by the fact that it would not commit itself to its purchase until it had obtained a license permitting its export. It had paid for the property. Before the Bigge Company had attached it the plant had been a complete manufacturing unit. Immediately thereafter it was in process of destruction as such; the complete demolition of the

structure was certain, the plaintiff was under contract to take it down and remove it from the premises. The plant could not have been re-erected upon its existing site; the plaintiff did not own it. At that time it was certain that what had been the building would soon be a mass of parts. In the circumstances it was certain that they would come to be such at the time the Bigge Company first went to work.

These parts when placed in some warehouse or laid out on some lot which the plaintiff might secure would be mere "scrap" and of merely speculative value for any purpose except for the use for which they were purchased.

I think that the payment for the property and proceeding to change it from parts in place of a complete building, into a mass of disconnected materials made the completion of the exportation economically imperative. This was not a mere preparation of the plant for exportation; by such action and change the parts had "been started upon such transportation" with the degree of certainty demanded by Coe *v.* Errol and the many cases which have endorsed it.

In this case, stronger than in the Hughes Bros. case the first owner of the plant had been paid for his plant and it was at that time in the sole possession of the Plaintiff. Thus one source of uncertainty as to whether the purpose to export would be executed did not exist; the Kaiser Company could not prevent it. The only contingency upon which the export would be abandoned after the demolition of the building had become assured was therefore, that the plaintiff would abandon his purpose and sell the parts here at a substantial loss, or re-erect the plant in California where the plaintiff was not engaged in business. This suggests an improbable hypothesis. "There was not the slightest probability of any such change, and it did not occur" Spaulding Bros. *v.* Edwards, 262 U. S. 66.

In reaching this conclusion I am not considering the shipment of the twelve per cent of the property which was later exported as this fact was not certain at the time the Bigge Company began taking the building down.

2. If the exportation of the materials of the plant was not before assured, that became certain when the twelve per cent of the corpus of the building had been sent abroad.

In support of this conclusion I repeat all of the elements of certainty of export mentioned above and in addition I cite this circumstance. Whatever possibility there might have been that after plaintiff had torn the plant down and carried the parts off the premises that it would sell them or re-erect them into a plant in California would be rendered extremely improbable when it appeared that it had kept here only a part of the materials of the plant which of course could not be sold as the materials from which a plant could be built or used to reassemble the old one.

3. When the building was in process of demolition and twelve percent of its parts had been exported the entire plant was in process of "movement" toward the sea, as required by the source case of Coe *vs.* Errol. The plant was a unit composed of many parts. It was of great size and weight and could only be moved through moving the parts as they were moved here. When the first shipments were made from the plant we would not say that the contractors were moving a beam or a brace; we would say that they had begun to move the plant, that the entire property was in process of moving. It could not be said as part after part of the plant had been moved down to the last rod or pulley, that what was left had remained unmoved in a very appreciable way every abstraction from the building affected what was left. If a body of stevedores had been hired to unload a ship, at their first movement we would not say that they were moving a piano, or a sack of wool, we would say that they were unloading the ship. In this case when the plaintiff exported twelve percent of the plant and was in process of shipping the rest the movement of the whole plant toward the sea had begun, as in the Hughes Brothers case where the first logs were being "pushed" into the stream the whole mass was being pushed in.

For the reasons stated there could remain no reasonable doubt that at the time the tax was levied that the whole shipment would be made as it finally was.

"The means of shipment are unimportant as long as the certainty of the foreign destination is plain." Richfield Oil Co. *vs.* State, supra. Where the Court finds from the "circumstances" that an export trade had been actually

intended and carried through the Court will be liberal in construing the manner in which the export had been executed. Carson Petrol Co. *vs.* Vial, 279 U. S. 95.

The Judgment will be for the Plaintiff.

Appendix "B"

Decision of the Supreme Court of the State of California, June 15, 1948

EDMONDS, Justice.

The status of personal property sold to a foreign purchaser but in this state on tax day is the question presented for decision by the County of Merced upon its appeal from an adverse judgment in an action to recover taxes. Although part of the property had been prepared for export, the greater portion of it was not in that condition and all of it was located at the plant of the seller in Merced county.

The following facts were presented by stipulation. In November, 1944, Empresa Siderurgica, S. A., a corporation organized under the laws of Colombia, South America, agreed to buy from Henry J. Kaiser Company the machinery and equipment of a cement plant. The contract of sale provided that title to the property should be transferred to the purchaser whenever it had furnished a letter of credit and an export license issued by the appropriate governmental agency.

Early in January, 1945, the required license had been obtained and a satisfactory letter of credit covering the unpaid balance of the purchase price deposited with a bank. The work of dismantling the plant and packaging it for shipment was then commenced by Bigge Drayage Company, pursuant to a contract made by it with the purchaser's forwarding agent. The Bigge company conducts a general trucking business and is a common carrier by motor vehicle, licensed by the Interstate Commerce Commission to engage in interstate and foreign commerce.

The dismantling and packaging operations continued expeditiously, with due regard for war-time shipping condi-

tions, throughout the succeeding months, the packages being labeled at the plant site with the name of Empresa, as consignee. The specified place of delivery was Medellin, Colombia, South America. By March 5, 1945, the statutory date for the assessment of property for the tax year 1945-46, 12% of the plant had been shipped out of the county; 10% had been dismantled and crated or prepared for shipment; 34% had been dismantled but not crated or prepared for shipment; and 44% had not been dismantled. Not later than January 18, 1946, all of the machinery had been shipped out of the County of Merced on cars of the Atchison, Topeka, and Santa Fe Railway Company, and before the end of that month was enroute to South America by ocean carrier.

The original assessment, made upon the basis of the value of the entire plant, was reduced by the board of supervisors to require payment of taxes only upon the 88% of the plant which was in the county on tax day. Empresa paid under protest the amount of the tax computed accordingly.

The position of the county is that, on tax day, none of the property assessed had begun its journey to a foreign destination and, therefore, had not acquired the status of an export. Until the goods have been delivered to a common carrier for transportation, they say, such property is not an export and may be taxed. Empresa maintains that, at the time of the assessment, the plant was an export because by the agreement for the sale of the property the parties intended foreign shipment and neither party could prevent its exportation without breaching the contract. It is also argued that because of Bigge's license as a common carrier, the delivery of possession to that company was the same as delivery to a railroad or a ship; the foreign destination was fixed and if on tax day any part of the plant was an export, all of it came within that category.

Article 1, section 10, clause 2, of the Constitution of the United States provides: "No State shall without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . . . ." The trial judge determined, as a matter of law, that when the goods have been committed to exportation, a tax imposed upon them amounts to taxation of an export. Another basis for the decision was that "proceeding to change . . . (the plant) from parts in

place of a complete building, into a mass of disconnected materials made the completion of the exportation economically imperative. This was not a mere preparation of the plant for exportation; by such action and change the parts had 'been started upon such transportation' with the degree of certainty demanded by Coe *v.* Errol, (116 U. S. 547) and the many cases which have endorsed it."

Although the Coe case was based upon the commerce clause of the Constitution, the United States Supreme Court, has declared that the same rule applies to the export clause. (Ritchfield Oil Corp *v.* State Bd. of Eq., 329 U. S. 69, 79; Turpin *v.* Burgess, 117 U. S. 504, 506; Brown *v.* Maryland, 12 Wheat. (U. S.) 419.) Logs had been floated down a river to the town of Errol, where they were to be shipped in interstate commerce. The town's assessment of them was attacked upon the ground that, at the time of the levy, they were in such commerce and not subject to taxation. The court, in deciding against the property owner, stated that "no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State". (P. 527.) But it declared "that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey. . . . It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many States there would be nothing but the lands and real estate to bear the taxes. Some of the Western States produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State. . . . But this movement does not begin until the articles have been shipped or started for transportation from the

one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain." (pp. 527, 528). These principles have been stated and followed in the few cases which have applied either Article I, section 10, clause 2, or Article I, section 9, clause 5 of the Constitution. (See Richfield Oil Corp. *v.* State Bd. of Eq., supra, p. 79.)

In Von Hamm-Young Co. *v.* City and County of San Francisco, 29 Cal. 2d 798, relied upon by Empresa, goods purchased in San Francisco and moved from the place of purchase to warehouses to await shipping space were held to be exempt from tax because of the commerce clause. It was there said that "the movement of the goods from the place of purchase to the warehouses must be considered a movement in interstate commerce . . ." (P. 807.) In the present case, there was no movement of the goods from the place of purchase. The Bigge company, which had the contract for dismantling and packaging, performed this function at the plant site. Eventually, the packaged goods were delivered to the railroad company, whose tracks ran alongside the plantsite, for transportation to the port of embarkation. But except for the 12% of the machinery which was not in the county on tax day, none of the packages had been delivered to the railroad carrier.

In the Richfield Oil Corporation case, supra, the court said: "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved." (P. 82.) In that case the plaintiff corporation sold oil to the New Zealand government f.o.b. its tanker at Los Angeles for export to that country. Although title passed upon delivery to the tanker, sales tax was levied

against the gross amount of the sale. After payment, plaintiff sued for refund, invoking the exemption of section 10, Article I of the Constitution. The tax was held invalid because delivery to the purchaser's carrier constituted the commencement of exportation to the same extent as would delivery to a common carrier in the usual situation. The court stated, "Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad." (P. 83.) As in Coe *v.* Errol, supra, the determining factor was not the owner's intention to export but whether or not exportation had commenced.

On tax day, the machinery which is the subject of the assessment here under attack had been delivered into the possession of the forwarding agent for the purpose of packing and shipping it. But the preparations for shipment, including the preparation of foreign documents and bills of lading, negotiations for shipping space by rail and sea and incidental activities in readying the machinery for shipment out of the country are not the equivalent of delivery to a common carrier for transportation. The fact that the Bigge company was licensed as a common carrier in interstate and foreign commerce is not material, for it was not employed to performed the functions of such a carrier; it undertook only to dismantle and prepare the property for shipment. It cannot, therefore, be seriously contended that delivery of possession to Bigge was equivalent to delivery to a common carrier for transportation.

The property owner's argument that because 12% of the plant had been shipped out of the county and was clearly an export, the remaining 88%, whether dismantled and packaged or not, was likewise an export, cannot be sustained. This contention assumes that intention to export rather than the commencement of exportation is the determining factor. The fact that a portion of the plant had actually been shipped is not controlling as to that portion which was in the process of preparation for exportation, although there can be no question concerning the owner's intention to take it out of the country. "The exemption

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In the Supreme Court

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Appellants,

vs.

COUNTY OF MERCED, a municipal corporation, J. EMMETT MCNAMARA, Assessor of the County of Merced, et al.,

Appellees.

Appeal from the Supreme Court of the State of California.

BRIEF OF APPELLANTS IN REPLY TO APPELLEES' STATEMENT OPPOSING JURISDICTION.

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BRIEF OF APPELLANTS IN REPLY TO APPELLEES' STATEMENT OPPOSING JURISDICTION.

The appellees have filed a statement opposing the jurisdiction of this Court upon the ground that the federal question involved is unsubstantial.

THE FEDERAL QUESTION INVOLVED IS SUBSTANTIAL.

As to the point that the federal question involved is not substantial, we are more than satisfied to stand on our statement as to jurisdiction.

However, it may be pointed out:

(1) That the seriousness of the federal question involved and the grave doubt as to the correctness of the decision of the Supreme Court of California are demonstrated by:

(a) The fact that the Superior Court reached the conclusion that the tax was one upon an export and hence prohibited by the Federal Constitution.

(b) The fact that the Supreme Court of California held that there must be delivery to a common carrier before an article becomes an export.

(c) The fact that the Supreme Court of California held that although part of the cement plant had been shipped and was clearly an export, the remaining part of the plant was not an export.

A liberal construction has been accorded by this Court where it is found from the circumstances that export trade has been actually intended and carried through, and in such cases primary consideration is given matters of substance and not of form.

On page 4 of its objections, appellees say:

"The Supreme Court of California recognized in its opinion that exportation may commence by means

other than delivery to a common carrier for transportation."

But when a review is made of the stipulated facts in this case we find that this principle is completely disregarded.

A summary of the facts reveals that a non-severable contract was entered into by the domestic seller and the foreign purchaser for the sale of the entire cement plant, an export license was issued permitting the export of the entire cement plant, the foreign purchaser paid for the entire cement plant and upon payment title passed to it; coincidentally with the passage of title, the entire cement plant was delivered to an export forwarding agent and a contractor which immediately began to dismantle, package, and ship the entire cement plant; and that the dismantling, packaging and shipping continued as an integrated operation without cessation from the time of the passage of title in January of 1945 until the entire cement plant was completely exported.

Yet the Supreme Court of California held that 14% of the cement plant which had been delivered to the railroad common carrier on March 5, 1945 (the tax day), was clearly an export, but the balance which was committed to exportation and was in the process of being so exported was not an export.

It is without question that this decision of the Supreme Court of California is contrary to the decisions of this Court in holding that only by delivery to a common carrier may an article become an export.

The decisions of this Court consistently hold:

"The means of shipment are unimportant so long as the certainty of the foreign destination is plain."

Richfield Oil Corp. v. State Board, 329 U.S. 69, 83.

"The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result."

Spalding & Bros. v. Edwards, 262 U.S. 66, 69-70.

"For in determining the meaning and application of the constitutional provision, we are concerned with matters of substance, not of form. When the merchandise is brought from another country to this, the extent of its immunity from state taxation turns on the essential nature of the transaction, considered in the light of the constitutional purpose, and not on the formalities with which the importation is conducted or on the technical procedures by which it is effected."

Hooven & Allison Co. v. Evatt, 324 U.S. 652, 662-663.

Prior to reversal by this Court in the *Richfield* case, supra, the Supreme Court of California held that delivery to a common carrier was necessary before an article became an export. In that case the foreign purchaser furnished its own vessel to effect exportation.

In this case, we are again met with the same theory; that before the cement plant may become an export, it must be delivered to a common carrier.

This decision of the Supreme Court of California is in direct conflict with the decision of this Court in the *Richfield* case, supra, and will necessarily affect all exports, not only from California ports, but from all of the states.

Dated, Oakland, California,
September 22, 1948.

Respectfully submitted,
SCOTT D. KELLOGG,
Attorney for Appellants.

In the Supreme Court
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No. 327

EMPRESA SIDERURGICA, S. A., a corporation of Colombia, South America, and VANDERBURGH & CO., INC., a California corporation,

Appellants,

vs.

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Appellees.

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Appellees.

APPELLANTS' OPENING BRIEF.

REFERENCES TO THE OFFICIAL REPORT OF THE OPINION OF THE SUPREME COURT OF THE STATE OF CALIFORNIA.

The decision of the Supreme Court of California has not been officially reported at the time of writing

this brief. It is unofficially reported in 32 A.C. 95, 194 P. (2d) 527, and is found in the record at pages 104 to 109.

STATEMENT OF THE GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The suit was instituted by appellants to recover a tax which the appellees had levied upon a complete cement manufacturing plant, said tax, after assessment, being reduced purportedly to cover only the portion of the plant remaining in the county on tax day. (March 5, 1945.) The cement plant was sold to Appellant Empresa Siderurgica, S. A., a corporation of Colombia, South America, for exportation to Medellin, Colombia, which plant was so exported. (Compl. VIII-XIII, R. 4-6.) All averments of the complaint, other than that the property assessed was in interstate or foreign commerce and was an export, were admitted by the answer. (R. 13-15.)

The tax was levied under and by virtue of the California Revenue and Taxation Code, Division 1, entitled "Property Taxation", enacted 1939, as amended and in effect on March 5, 1945. The applicable sections of the code in force at the time of the levy are attached as an appendix to this brief. Concisely, the statute provided for an annual assessment of property in the county to the owner on the first Monday in March, and Section 202 specifically exempted the property upon which a tax was prohibited either by the Constitution of the United States or of California.

The complaint in the trial Court, in addition to incorporating the protest filed at the time the tax was paid under protest (in which appellants asserted that the California Statute if construed, applied or enforced in such manner as to impose a tax on the said cement plant was in contravention of the provisions of Article I, Section 10, Clause 2 of the Constitution of the United States, R. 4-5), directly averred in paragraph XI:

> "That the said tax was and is an unlawful tax on the personal property of Plaintiffs and was illegally levied and placed upon the tax roll of the said County of Merced under color of law therefor. That the imposition of the said personal property tax is an unlawful tax on the following grounds:
>
> "(1) That the property assessed by this said personal property tax and for which payment under protest was made as aforesaid, was at the time of the assessment of this tax and ever since has been an export and as such was and is exempt from taxation by the State of California and/or the County of Merced under the provisions of Article I, Section 10, Clause 2 of the Constitution of the United States, which prohibits taxation of exports by the states, and the said property was not properly subject to taxation by the State of California and/or the County of Merced under Article XIII, Section 1 of the Constitution of the State of California and Section 202 of the Revenue and Taxation Code of the State of California.
>
> "(2) That the property assessed by this personal property tax and for which payment under

protest was made, as aforesaid, was at the time of assessment of this tax in the hands of a common carrier and was and is property or commodities entered and moving in the course of transportation in foreign commerce, and as such, was and is exempt from taxation by the State of California and/or the County of Merced under the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States and under Article XIII, Section 1 of the Constitution of the State of California, and Section 202 of the Revenue and Taxation Code of the State of California; and that such taxation constituted and does constitute an interference with goods entered and moving in the course of foreign commerce." (R. 5.)

Precisely the same charge was made in the protest. (R. 8-9.)

The Trial Court reached the conclusion (R. 98):

"That on March 5, 1945, the cement plant and the parts thereof were so definitely committed to exportation and had advanced so far in the execution of a planned and finally accomplished exportation that its taxation was prohibited by Article I, Section 10, Clause 2 of the Constitution of the United States." (R. 98, Conclusions of Law II.)

Judgment was entered for the appellants. (R. 96.)

The appellees, County of Merced, et al., appealed to the California Supreme Court and the judgment appealed from was reversed on June 15, 1948. (194 P.

(2d) 527; R. 104-109.) In its final decision, the California Supreme Court said:

> "Article I, Section 10, Clause 2, of the Constitution of the United States provides: 'No State shall without the Consent of the Congress, lay any imposts or duties on Imports or Exports * * *.' The trial judge determined, as a matter of law, that when the goods have been committed to exportation, a tax imposed upon them amounts to taxation of an export." (R. 106.)
>
> "The property owner's argument that because 12% of the plant had been shipped out of the county and was clearly an export, the remaining 88%, whether dismantled and packaged or not, was likewise an export, cannot be sustained." (R. 108.)
>
> *Empresa Siderurgica, S. A. v. County of Merced*, 194 P. (2d) 527, 529, 530.

On July 8, 1948, a rehearing was denied, and the California Supreme Court thereafter had no power to review or modify its decision. See:

California Rules on Appeal, Rule 24;

Market Street Railway Company v. Railroad Commission, 324 U. S. 548.

An appeal to this Court was duly allowed by the Acting Chief Justice of the Supreme Court of the State of California on August 19, 1948. (R. 133-134.)

Since both in the complaint and in its protest appellants asserted that the personal property tax, if construed, applied or enforced so as to impose a tax on the said cement plant, was in contravention of the

Constitution of the United States, this Court under Section 237 of the Judicial Code has jurisdiction of the appeal. See:

Standard Oil Company v. Johnson, 316 U. S. 481, 482-3;

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 289;

First National Bank v. Anderson, 269 U. S. 341, 345-6;

United States v. County of Allegheny, 322 U. S. 174, 192.

Such jurisdiction of the appeal also attaches because it appears from the face of the opinion of the Court below that the constitutionality of the statute as construed and applied was involved and considered by it. See:

Chicago, etc., Co. v. Perry, 259 U. S. 548, 551;

Sully v. American National Bank, 178 U. S. 289, 298;

Nickey v. State of Mississippi, 292 U. S. 393, 394;

Whitfield v. Ohio, 297 U. S. 431, 435-6.

Appellees, in their Statement in Opposition to Jurisdiction assert on page 1 that no substantial federal question is presented. The answer is that the California Supreme Court in its final decision construed the statute as not exempting a portion of an entire export because that portion had not yet been delivered to a railroad common carrier, and this decision presents the constitutional question as to whether the

statute as so construed, enforced and applied, is repugnant to the Federal Constitution. See:

Richfield Oil Corp. v. State Board, 329 U. S. 69, 83;

Spalding & Bros. v. Edwards, 262 U. S. 66, 69-70;

Hooven & Allison Co. v. Evatt, 324 U. S. 652, 662-663.

Brief which we were permitted to file in answer to the Statement in Opposition to Jurisdiction (hereafter for brevity referred to as "our brief"), pp. 2-5, where the point is more fully discussed and pertinent portions of the above cited decisions quoted.

STATEMENT OF THE CASE

As heretofore indicated in the discussion of the jurisdiction, the action was one to recover a personal property tax levied by the appellees under the California Revenue and Taxation Code, Division 1. The property or article sold to Appellant Empresa Siderurgica, the foreign purchaser, was an entire, complete and operating cement manufacturing plant. After title had passed from the domestic seller to the foreign purchaser, after the export forwarding agent and the contractor-common carrier had taken possession and the cement plant was in the process of being dismantled, packaged and shipped, and after 14 carloads (12% of the entire plant) had left Merced County on

its way to Medellin, Colombia, South America, the assessor of said county assessed a personal property tax on the whole of the cement plant. Thereafter, when it was pointed out that 14 carloads were not within the jurisdiction of Merced County, the assessor appeared before the Board of Supervisors and had the tax reduced by 12%. This reduced tax was paid by appellants under protest and is the tax sought to be recovered in this case.

All the material facts are set out in the formal averments of the complaint (R. 1-6) and in the protest attached to the complaint as Exhibit "A" (R. 6-13), and they are admitted by the answer (R. 13-15.)

The case was submitted upon a stipulation and agreed statement of facts to which certain documents were attached and incorporated by reference, the parties offering no other evidence. (R. 97.) The stipulation is found in the record, pages 17-87. Although unnecessary, because no issue of fact was presented by the pleading or proof, formal findings of fact and conclusions of law were made by the Court (R. 97-99), the first finding being that the facts are as stated in said stipulation and agreed statement of facts. (R. 97.) As there was no challenge of the accuracy of that finding by the California Supreme Court, we will take the facts from said stipulation except as otherwise indicated. Concisely, they are:

Appellant, Empresa Siderurgica, S. A. is a corporation duly organized and existing under the laws of

Colombia, South America, having its principal place of business at Medellin, Colombia (R. 18), and will be hereafter referred to as "foreign purchaser". Appellant Vanderburgh & Co., Inc., is a California corporation and an export forwarding agent (R. 18), and will be hereafter referred to as "export forwarding agent".

Prior to November 11, 1944, negotiations were entered into between the foreign purchaser and Henry J. Kaiser Company, hereinafter referred to as "domestic seller", for the purchase of the Yosemite Portland Cement Plant located in Merced County, California. (R. 18.)

Thereafter on November 11, 1944, the domestic seller entered into a written contract for the sale of the Yosemite Portland Cement Plant to the foreign purchaser. (R. 18.) The cement plant sold under the contract was an entire, complete and operating cement plant. It included the quarry machinery, some of which was located at the plant site and some was located at the quarry, spare parts, laboratory equipment and all necessary items which are required in the operation of a cement plant, in addition to the cement plant itself. (R. 23.) In the contract of sale, the domestic seller made this representation and warranty: "Seller represents that said cement plant was being operated until July 1, 1944, that Seller purchased said cement plant from its former operator in operating condition as of that time, and Seller warrants that it has not thereafter sold or removed any

equipment or property from said cement plant except that listed in 'Exhibit B', attached hereto." (R. 25.) (Exhibit "B" contained items not necessary for the operation of the cement plant and property not owned by seller but located at the plant site, such as railroad tracks owned by Santa Fe Railroad and transmission lines owned by Pacific Gas & Electric.)

The purchase price of the entire cement plant was $555,000.00. (R. 27.)

Title to the foreign purchaser was to pass pursuant to the contract upon the occurrence of the following two conditions:

(a) The issuance of an export license by the U. S. Foreign Economic Administration, and

(b) The establishment of a letter of credit in payment for the entire cement plant. (R. 26-27.)

The contract also provided that upon the passage of title to the foreign purchaser, an export forwarding agent was to take delivery to ship the entire plant to the foreign purchaser in the Republic of Colombia. (R. 26-27.)

On December 2, 1944, appellant Vanderburgh & Co. was designated as the export forwarding agent in place of the export forwarding agent originally named in the contract of sale; and on the same date, the export forwarding agent entered into a written contract with the Bigge Drayage Company, a contractor and a common carrier by motor vehicle duly licensed by the Interstate Commerce Commission (hereinafter

referred to as contractor-common carrier) to dismantle the said cement plant; disassemble the equipment, and deliver the entire cement plant to the Atchison, Topeka and Santa Fe Railway Co. at the plant site for transportation by rail to the port of embarkation. (R. 18-19.) The Atchison, Topeka and Santa Fe Railway Co. will be hereinafter referred to as the railroad common carrier.

The contract with the contractor-common carrier set forth in detail the manner in which the plant would be dismantled in order that it could be reassembled at its destination.

For example, the contract represented and required that the foreign purchaser had employed a firm of consulting engineers to perform services in connection with the dismantling of the cement plant (R. 32); at least one photograph was to be taken of each machine or piece of equipment before and after dismantling, such photographs to be numbered and bear the same identification marks as the parts of which they were taken and filed so as to be readily accessible to persons reassembling the plant (R. 33); all separations to be made at point of joinder and permitted no cutting or disassembling of any part which would weaken the structure or parts when they are reassembled (R. 35); and the parts to be matchmarked in accordance with a method approved by the consulting engineers. (R. 37.)

The contractor-common carrier was an independent contractor in the performance of its contract with the export forwarding agent. (R. 41-42.)

The contract with the contractor-common carrier was to become effective upon the occurrence of the last of the following three conditions:

(a) The approval of the contract by the foreign purchaser.

(b) The issuance of an export license by the Foreign Economic Administration permitting the export of the cement plant.

(c) Notice approved by domestic seller that foreign purchaser had acquired title and export forwarding agent was entitled to possession. (R. 32.)

The export forwarding agent was obligated to pay to the contractor-common carrier for the performance of the contract the sum of $120,000.00. (R. 38.)

On December 15, 1944, the Foreign Economic Administration in Washington, D. C., issued Export License SP 2086 permitting the exportation of the entire cement plant from the United States to Colombia. (R. 20.) The license set forth that the articles and materials set forth on the schedules attached "constitute the total known requirements for this cement manufacturing plant". (R. 63.)

On January 3, 1945, a letter of credit covering the balance of the purchase price was deposited with the bank in favor of the domestic seller by the foreign purchaser. (R. 20-21.)

On the same day, January 3, 1945, the export forwarding agent delivered to the contractor-common carrier a letter approved by the domestic seller as fol-

> "In accordance with Paragraph 10 C of our Contract with you dated December 2, 1944, you are hereby notified that on this date purchaser acquired title and we took delivery of the Cement Plant, and the undersigned as Forwarding Agent has the right to possession." (R. 21.)

Thereupon, on said January 3, 1945, title to the entire cement plant passed to the foreign purchaser pursuant to the contract of sale, possession of the cement plant was delivered to the export forwarding agent by the domestic seller, and the contractor-common carrier pursuant to its contract with the export forwarding agent began to dismantle and disassemble the cement plant, package and deliver the packages to the railroad common carrier. (R. 21.)

From the date of passage of title to the foreign purchaser on January 3, 1945, to the date when the last of the cement plant left the United States on January 29, 1946, the respective activities of the export forwarding agent, the contractor-common carrier, the railroad common carrier, and the steamship carrier, consisted of one integrated and continuous operation in effecting the exportation of the entire and complete cement plant. (R. 21-22.)

On March 5, 1945, while the contractor-common carrier was dismantling, packaging and loading the cement plant on the railroad cars of the railroad common carrier, and while the railroad common carrier was transporting 14 carloads to the port of embarkation, Appellee J. Emmett McNamara, Merced County Assessor, hereinafter referred to as "Assessor" levied

a personal property tax on the whole and entire cement plant. (R. 21-22.) (It may be noted that in prior years the cement plant had been assessed as real property.)

Thereafter, when it was pointed out that 14 carloads out of a total of 123 carloads were out of the jurisdiction of the County of Merced, the Assessor and District Attorney appeared before the Board of Supervistors of Merced County and requested that the assessment be reduced 12% and this was done. (R. 22, 85.)

The appellants paid the reduced tax under protest. (R. 22.)

On January 18, 1946, the entire cement plant covered by the contract of sale had been packaged and shipped out of and had left the County of Merced and the contractor-common carrier had fully performed its contract with the export forwarding agent. (R. 22.)

On January 29, 1946, the last carload of the entire, complete and operating cement plant sold to the foreign purchaser had been loaded on the steamship common carrier and had left the State of California and the United States. (R. 22.)

Thereafter this action was initiated by appellants to recover the tax paid under protest to appellees herein. (R. 22-23.)

As stated, all of the above facts were admitted in the answer, stipulated to, and accepted as correct in the opinion of the California Supreme Court.

SPECIFICATIONS OF THE ASSIGNED ERRORS INTENDED TO BE URGED BY APPELLANTS.

The appellants intend to urge each of its twenty assigned errors found in the Transcript (R. 127-133) as follows:

(1) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in sustaining the validity of the California Revenue & Taxation Code, Division I, as amended, construed, applied and enforced to impose a personal property tax upon a portion of an entire and complete cement plant here involved, as against appellants' contention that said Act, so construed, applied and enforced, is invalid under Article I, section 10, clause 2, of the United States Constitution.

(2) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the California Revenue & Taxation Code, Division I, as amended, when construed and applied to impose a personal property tax upon a portion of an entire and complete cement plant committed and in the process of exportation to Colombia, South America, and which was so exported, is not invalid under and repugnant to the provisions of Article I, section 10, clause 2, of the United States Constitution.

(3) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the tax levied upon and collected from appellants, Empresa Siderurgica, S. A., a corporation of Colombia, South America, and Van-

derburgh & Co., Inc., a California corporation, pursuant to the California Revenue & Taxation Code, Division I, as amended, was not an impost or duty on exports in violation of or repugnant to or within the meaning of Article I, section 10, clause 2, of the United States Constitution.

(4) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the preparation for export not only included: (a) the negotiations preceding the signing of the export sales contract; (b) the execution of the export sales contract; (c) the employment of the export forwarding agent; (d) the employment of Bigge; (e) the issuance of the export license; and (f) the establishment of the letter of credit; but also included: (g) the passage of title and delivery of the cement plant to the purchaser; (h) delivery of the cement plant to the export forwarding agent and its activities in contracting for the dismantling, packaging, loading, railroad cars, shipping space, preparation of foreign documents, bills of lading and other activities; and (i) delivery of the cement plant to Bigge and its activities in dismantling, packaging and shipping; and only excepted that part of the plant which had been actually loaded on railroad cars and left the county on March 5, 1945.

(5) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in failing to give consideration or effect to:

(a) That the contract of November 11, 1944, between Empresa and Kaiser was an export sales contract.

(b) The provisions of the export sales contract which, among other things, required passage of title to purchaser and delivery of the entire and complete cement plant to the purchaser's forwarding agent upon payment therefor.

(c) The provisions of the export sales contract which, among other things, provided for the sale of an entire and complete cement plant and which by its terms was not divisible or severable.

(d) The provisions of the Bigge contract which, among other things, required Bigge upon taking possession of the cement plant to dismantle, package and load on railroad cars without interruption or cessation until the entire cement plant had been completely dismantled, packaged and shipped.

(e) The provisions of the Bigge contract which, among other things, provided for the preparation for shipment of an entire and complete cement plant and which by its terms was not divisible or severable.

(f) The issuance of an export license by the Foreign Economic Administration permitting the exportation of the entire and complete cement plant.

(g) The provisions of the letter of credit for the account of Banco de Bogota, Medellin, Colom-

bia, South America, on behalf of appellant, Empresa Siderurgica, S. A., (the purchaser) for the balance of the purchase price of the entire cement plant which, among other things, required the presentation of the export license permitting the export of the entire cement plant to the Republic of Colombia, South America.

(f) The actual exportation of the entire cement plant to Colombia, South America, pursuant to the export sales contract, the Bigge contract, the export license and the letter of credit.

(6) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in failing to give consideration or effect to the fact that the following are the usual, necessary and regular steps to effect the exportation of the entire cement plant:

(a) The export sales contract of November 11, 1944.

(b) The employment of an export forwarding agent on December 2, 1944.

(c) The Bigge contract of December 2, 1944.

(d) The issuance of an export license by the U. S. Foreign Economic Administration on December 15, 1944.

(e) The issuance of a letter of credit in payment of the entire cement plant on January 3, 1945.

(f) The passage of title and delivery to the foreign purchaser on January 3, 1945.

(g) The delivery of the entire cement plant to the export forwarding agent on January 3, 1945.

(h) The delivery of the entire cement plant to Bigge on January 3, 1945.

(i) The integrated operation of the export forwarding agent in preparing foreign documents, bills of lading, negotiations for shipping space by rail and sea; the dismantling, packaging and loading on railroad cars by Bigge; the movement of the railroad cars to the seaboard; and the loading on the steamships at the seaboard which carried the entire cement plant to its foreign destination; all of which commenced on January 3, 1945, and continued without interruption or cessation until the whole of the cement plant left the United States on January 29, 1946.

(j) That the entire cement plant was actually exported.

(7) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the export sales contract was effective and operative as a matter of law to sever and change the entire cement plant from real property to personal property, which was so assessed as personal property by the County of Merced, but was not effective or operative as a matter of law as the

first step in and the commencement of the exportation of the said cement plant.

(8) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the passage of title of said cement plant to purchaser and the delivery of the cement plant to the purchaser, purchaser's export forwarding agent and Bigge, pursuant to the export sales contract, occurred prior to the commencement of exportation of said cement plant.

(9) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that delivery to the export forwarding agent on January 3, 1945, pursuant to the export sales contract and coupled with the subsequent acts of complete exportation of the entire cement plant, was not the equivalent of delivery to a common carrier for transportation.

(10) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that delivery to Bigge Drayage Co. on January 3, 1945, pursuant to its contract with the export forwarding agent, dated December 2, 1944, coupled with its subsequent acts of dismantling, packaging and shipping the entire cement plant to the foreign destination, was not equivalent to delivery to a common carrier for transportation.

(14) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that no exportation

of the cement plant commenced until the parts thereof were loaded on the cars of a railroad common carrier.

(12) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the property owner's argument that because 12% of the plant had been shipped out of the county and was clearly an export, the remaining 88%, whether dismantled and packaged or not, was likewise an export, cannot be sustained.

(13) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the integrated activities of the export forwarding agent and Bigge was an intention to export rather than a commencement of exportation.

(14) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the fact that a portion of the cement plant had actually been shipped, is not controlling as to that portion which is in the process of preparation for exportation, although there can be no question concerning the owner's intention to take it out of the country.

(15) The Supreme Court of the State of California erred in its final judgment in the above entitled cause, in its determination that the trial judge erred when he held, as a matter of law, that when the goods have been committed to exportation, a tax imposed upon them amounts to taxation of an export.

(16) The Supreme Court of the State of California erred in its final judgment in the above entitled cause, in its determination that the trial judge erred in holding that "proceeding to change * * * (the plant) from parts in place of a complete building, into a mass of disconnected materials made the completion of the exportation economically imperative. This was not a mere preparation of the plant for exportation; by such action and change the parts had 'been started upon such transportation' with the degree of certainty demanded by *Coe v. Errol* (116 U.S. 517), and the many cases which have endorsed it."

(17) The Supreme Court of the State of California erred in its final judgment in the above-entitled cause, in its determination that on March 5, 1945, the statutory date for the assessment of the personal property for the tax year 1945-46, the portion of the entire and complete cement plant being dismantled, and packaged, was not committed to exportation within the meaning of Article I, section 10, clause 2, of the United States Constitution.

(18) The Supreme Court of the State of California erred in its final judgment in the above entitled cause, in its determination that the tax levied upon appellants was not invalid, illegal or unenforceable and was not contrary to, or in violation of, the provisions of Article I, section 10, clause 2, of the Constitution of the United States, because said tax was levied on the portion of the cement plant which had not been loaded on the cars of a railroad common carrier.

(19) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the scope and effect of United States Constitution, Article I, section 10, clause 2, permits or requires different results as to the validity of a tax upon exports when (a) the goods are delivered for exportation to the foreign purchaser, purchaser's export forwarding agent and contractor, and (b) when the goods are delivered for exportation to a railroad common carrier.

(20) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in reversing the judgment of the Superior Court of the State of California.

SUMMARY OF ARGUMENT.

The Court below erred in deciding that no exportation of the Cement Plant commenced until after delivery of the Cement Plant to the Railroad Common Carrier. (Assignments of Error 1-20; R. 127-133.)

(1) The decision of the Court below that exportation does not start until the goods have been loaded on a common carrier is illogical, and would practically nullify the provisions of Article I, section 10, clause 2 of the Constitution, and would do away with none of the evils which it was the object of the Constitution to suppress. (pp. 27-28.)

(2) The article sold was an entire, complete and operative cement plant which was sold as a unit and not divisible. That the means chosen to effect the

exportation of the cement plant were relevant and appropriate to the contract made. (pp. 28-30.)

(3) While it was held that the export sales contract was effective to change the cement plant from real property to personal property, it was also the first step in and the commencement of the exportation of the entire and complete cement plant. (p. 30.)

(4) Delivery to the export forwarding agent and the contractor-common carrier marked the commencement of the exportation of the entire cement plant. (pp. 30-37.)

(a) Delivery of the cement plant to the export forwarding agent was equivalent to delivery to a common carrier. (pp. 37-40.)

(b) Delivery of the cement plant to the contractor-common carrier was equivalent to delivery to a common carrier. (pp. 40-41.)

(5) The process of exportation cannot be compared to the manufacture of an article prior to exportation. (pp. 41-42.)

(6) The entire, complete and operative cement plant was not divisible. (pp. 42-43.)

(7) The certainty that goods are headed to sea may exist though no common carrier is involved. (pp. 43-48.)

(8) The act which vested title in the foreign purchaser irrevocably committed the entire and complete cement plant to exportation. (pp. 48-51.)

(9) The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result. (pp. 51-56.)

(10) The law is not concerned with the means of shipment except to inquire whether the means chosen reasonably guarantees continuity of the export journey and foreign delivery in good faith. (pp. 56-61.)

(11) For the purpose of determining whether articles are imports or exports, the determination of the question is governed by matters of substance and not form or the technical procedure with which the transaction is effected. (pp. 61-62.)

ARGUMENT.

That the entire, complete and operative cement plant was actually exported from California to Colombia, South America, in conformity with a contract for such exportation is not, and cannot be challenged.

Article 1, Section 10, Clause 2 of the United States Constitution reads:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's Inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

The final opinion of the Court below is to the effect that a personal property tax on an entire, complete and operative cement plant may be reduced by 12% when it is learned that 14 car loads out of a total of 123 car loads have been delivered to a railroad common carrier by tax day, and that the tax as reduced on the remainder of the cement plant not yet delivered to the railroad common carrier was not repugnant to the Constitution. This remarkable conclusion is placed upon four grounds:

1. Delivery of possession to export forwarding agent was not the equivalent of delivery to a common carrier for transportation.

2. Delivery of possession to contractor-common carrier was not the equivalent to delivery to a railroad common carrier for transportation.

3. Appellants' argument that because 12% of the plant had been shipped out of the country and was clearly an export, the remaining 88%, whether dismantled and packaged or not, was likewise an export, cannot be sustained.

4. The fact that a portion of the plant had actually been shipped is not controlling as to that portion which was in the process of preparation for exportation, although there can be no question concerning the owner's intention to take it out of the country.

Basically, all four of the above referred to grounds are founded upon only one legal theory: That there

must be delivery to a common carrier before the cement plant or any part thereof becomes an export.

The correctness of each of the above grounds and the basis therefor is challenged by the appellants' Assignments of Error. (Assignments of Error 1-20; R. 127-137.) Since each of the four grounds hereinabove enumerated are so closely allied to the basis therefor, they will be discussed under the one heading.

All emphasis throughout the Argument will be ours unless otherwise noted.

THE CALIFORNIA SUPREME COURT ERRED IN ITS DECISION THAT NO EXPORTATION OF THE CEMENT PLANT COMMENCED UNTIL AFTER DELIVERY OF THE CEMENT PLANT TO THE RAILROAD COMMON CARRIER.

As heretofore stated the California Supreme Court based its conclusion that the statute as construed was not repugnant to the Constitution upon four grounds and that basically those four grounds were the result of one legal theory as follows: That there must be delivery to a common carrier before the cement plant or any part thereof becomes an export.

We submit that the slightest reflection will show the error and illogic of this view. If all that was intended by the Constitution was to prohibit taxation of exports after they had been loaded on a vessel or railroad car, the prohibition is meaningless and of no practical value. None of the evils which it was the express object of the framers of the Constitution to do away with

would have been ended. The seaboard states could have continued to tax the goods sent from other states so long as they were not loaded on a common carrier.

The article sold for export was an entire, complete and operative cement plant. It was sold to the foreign purchaser in its existing form and place. The only representation and warranty in the contract of sale was that it was operated until July 1, 1944, and it was warranted that nothing had been removed between that date and the date of the contract of sale, November 11, 1944, which would make it inoperative. An assembled and operative cement plant was needed by the foreign purchaser in Colombia, South America, and that was the article purchased.

The exportation of the cement plant was the only act to be done upon the consummation of the sale.

The foreign purchaser in its contract of sale with the domestic seller provided that upon the passage of title to it of the cement plant that the domestic seller would deliver possession of the cement plant to an export forwarding agent for its exportation. The export forwarding agent in the performance of its obligations in handling the exportation, entered into a written contract with a contractor-common carrier for the dismantling, packaging, and loading on the cars of the railroad common carrier the entire and complete cement plant.

The first point to be considered is, what was the article of commodity to be exported? It is the position of appellants that the contract of sale between the

domestic seller and the foreign purchaser determines this question and that an entire, complete and operative cement plant was sold.

This Court said in part in *York Mfg. Co. v. Colley*, 247 U.S. 21, 24-25:

> "* * * since the ruling in McCulloch v. Maryland, 4 Wheat (US) 316, there has been no doubt that the interstate commerce power embraced that which is relevant or reasonably appropriate to the power granted, so also from such doctrine there can be no doubt that *the right to make an interstate commerce contract includes in its very terms the right to incorporate into such contract provisions which are relevant and appropriate to the contract made.*"
>
> *York Mfg. Co. v. Colley*, 247 U.S. 21, 24-25.

The foreign purchaser contracted to purchase an entire, complete and operative cement plant and this case comes before this Court by stipulation that that is the article which was purchased. Further, that the foreign purchaser had the right to incorporate into such contract provisions which were relevant and appropriate to effect the exportation of the entire, complete and operative cement plant. The foreign purchaser required that the domestic seller represent that the cement plant was operating until July 1, 1944, and required that the domestic seller warrant that no part had been removed between that date and the date of the contract of sale. The foreign purchaser also required that the contract provide that upon passage of title of the cement plant to it, that the entire cement

plant would be delivered to an export forwarding agent for exportation. The requirements as to the means of exportation were relevant and appropriate to the contract made.

In previous years the cement plant had been assessed as real property. However, on March 5, 1945, in recognition of its changed status by reason of the contract of sale and its movement from its site, the assessor taxed the entire cement plant as personal property. Thereafter, when it was pointed out that on tax day 14 carloads had left the jurisdiction of Merced County, the tax assessor (by calculating that 14 carloads out of 123 carloads was 12%) requested the board of supervisors to reduce the tax by 12% which was done. Certainly, if the export sales contract was effective for the purpose of changing the cement plant from real property to personal property, it was likewise effective for committing to exportation the entire and complete cement plant, and such contract was the first step in and the commencement of the exportation of the cement plant.

The point upon which this case turns is the time when exportation commenced.

It is the position of appellants that exportation commenced on January 3, 1945, when all of the conditions precedent to the sale had been performed; i.e., the issuance of the export license by the federal government and the payment of the purchase price to the domestic seller; at which time the title passed to the foreign purchaser; delivery of the cement plant was

taken by the export forwarding agent; and the contractor-common carrier began dismantling, packaging and loading the cement plant on the cars of the railroad common carrier.

The California Supreme Court in its decision held that the activities of the export forwarding agent and the contractor-common carrier was evidence only of an intention to export and not the commencement of exportation and that when 11 carloads of the cement plant had been loaded and left Merced County by tax day (March 5, 1945) only that part of the cement plant was exempt from the personal property tax and approved the collection of the tax less 12%.

In the final opinion of the Court below it is said:

> "The property owner's argument that because 12% of the plant had been shipped out of the county and was clearly an export, the remaining 88%, whether dismantled and packaged or not, was likewise an export, cannot be sustained. This contention assumes that intention to export rather than the commencement of exportation is the determining factor. The fact that a portion of the plant had actually been shipped is not controlling as to that portion which was in the process of preparation for exportation, *although there can be no question concerning the owner's intention to take it out of the country.*"
>
> 194 P. (2d) 527, 530. (R. 108-109.)

In support of its decision, the California Supreme Court cites *Coe v. Errol*, 116 U.S. 517.

Coe and others owned a large number of spruce logs which had been drawn down to the town of Errol, New

Hampshire, and placed in Clear Stream and on the banks thereof preparatory to their being floated down the Androscoggin River to the State of Maine. The timber had been cut in New Hampshire the spring and summer before and were held at Errol by the owners waiting for the spring floods at which time the logs would be floated to Maine.

In holding that the logs were properly subject to local taxation, with which appellants have no argument, the Court said:

> "Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his *partial preparation* to do so, exempt them from taxation? This is the precise question for solution.
>
> "This question does not present the predicament of goods in course of transportation through a State, though detained for a time within the State by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation, and are clearly under the protection of the Constitution. And so, we think, *would the goods in question be when actually started in the course of transportion to another State*, or delivered to a carrier for such transportation. (p. 525.)
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> * * * * * * *
>
> * * * Though intended for exportation, they may never be exported: the owner has a perfect right to change his mind; and *until actually put in motion, for some place out of the State*, or committed to the custody of a carrier for trans-

portation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State? (p. 526.)

* * * * * * *

"But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or *have been started upon such transportation in a continuous route or journey.* (p. 527.)

* * * * * * *

"* * * And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State. It is true, it was said in the case of *The Daniel Ball*, 10 Wall. 557, 565: '*Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.*' But this movement does not begin until the articles have been shipped or *started for transportation from the one State to the other.* (p. 528.)

* * * * * * *

"* * * *Until actually launched on its way to another State*, or committed to a common carrier for transportation to such State, *its destination is not*

fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. (p. 528.)

* * * * * * *

* * * *Until* shipped or *started on its final journey out of the State* its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing.

"The application of these principles to the present case is obvious. The logs which were taxed, and the tax on which was not abated by the Supreme Court of New Hampshire, had not, when so taxed, *been* shipped or *started on their final voyage or journey to the State of Maine.* They had only been drawn down from Wentworth's location to Errol, the place from which they were to be transported to Lewiston in the State of Maine. There they were to remain until it should be convenient to send them to their destination." (p. 528.)

Coe v. Errol, supra, is quoted from at length for the reason that it is relied upon by appellants in this Court, and was also relied upon in the California Supreme Court and the trial Court in support of its position that the entire cement plant was an export and therefore not taxable. This decision was also relied upon by the California Supreme Court and the appellees in support of their position that only that part of the cement plant which had been delivered to the railroad common carrier was exempt from taxation. This decision was also relied upon by the trial Court in holding that the entire cement plant was an export and therefore not taxable.

In *The Daniel Ball*, 10 Wall. 557, 565, quoted in *Coe v. Errol*, supra, this Court said:

> "Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced."

The California Supreme Court in complete disregard of the contract of sale as to the unity of the article sold, the cement plant, held that only that part of the cement plant which had been delivered by the contractor common carrier to the railroad common carrier was exempt from taxation, seizing upon *Coe v. Errol*, supra, to sustain its position.

However, an analysis of *Coe v. Errol*, supra, reveals that while the best evidence of exportation may be the delivery of the article to a common carrier, but in each and every place the Court so holds, it also points out that this is not the only and exclusive manner of exportation. For example:

> "*when actually started in the course of transportation to another State*, or delivered to a carrier for such transportation. (p. 525.)

> "until they are committed to the common carrier for transportation out of the State to the State of their destination, *or have started on their ultimate passage to that State*." (p. 525.)

> "*until actually put in motion for some place out of the State*, or committed to the custody of a carrier for transportation to such place. (p. 526.)

"*when not under motion or* shipment, * * * (p. 526.)

"until they have been shipped, or entered with a common carrier for transportation to another State, *or have been started upon such transportation in a continuous route or journey.*" (p. 527.)

"But this movement does not begin until the articles have been shipped *or started for transportation from the one State to the other.* (p. 528.)

"*Until actually launched on its way to another State,* or committed to a common carrier for transportation to such state, * * * (p. 528.)

"Until shipped *or started on its final journey out of the State* * * * (p. 528.)

"The logs * * * had not * * * been shipped *or started on their final voyage or journey to the State of Maine.*" (p. 528.)

It is submitted that *Coe v. Errol,* supra, does not hold that the only way an article may become an export is by delivery to a common carrier, which is the holding of the California Supreme Court in its decision in this case. The use of the word "or" in *Coe v. Errol,* supra, is, we believe, significant.

In the instant case, coincidentally with the passage of title to the foreign purchaser, delivery and possession of the entire cement plant was taken by the export forwarding agent. On the same day, pursuant to a written contract with the export forwarding agent, the contractor-common carrier began dismantling, packaging and loading on the cars of the railroad common carrier the entire and complete cement plant. From the

date of passage of title to the foreign purchaser to the date when the last of the cement plant left the United States, the respective activities of the export forwarding agent, the contractor-common carrier, the railroad common carrier, and the steamship carrier, consisted of one integrated and continuous operation in effecting the exportation of the entire and complete cement plant.

Certainly the cement plant had started in the course of transportation, started on its ultimate passage to its foreign destination, was actually put in motion, started upon such transportation in a continuous route or journey, launched on its way to its foreign destination, and started on its final voyage or journey to Colombia, South America, as required by the leading case of *Coe v. Errol*, supra.

The Court below in its final decision held that delivery to an export forwarding agent was not equivalent to delivery to a common carrier. The Court said:

> "On tax day, the machinery which is the subject of the assessment here under attack had been delivered into the possession of the forwarding agent for the purpose of packing and shipping it. But the preparations for shipment, including the preparation of foreign documents and bills of lading, negotiations for shipping space by rail and sea and incidental activities in readying the machinery for shipment out of the country are not the equivalent of delivery to a common carrier for transportation."

191 P. (2d) 527, 530. (R. 108.)

In *Clarke & Co. v. Clarke* (C.C. Ga.), 3 Woods, 408, 410-11, Federal Cases No. 2846, p. 943 at pp. 944-5, the Federal Court considered the taxation of goods in the possession of an exporter. There, the Court said in part:

> "The logs on which the tax was levied were the property of and *were in possession of persons engaged exclusively in exporting timber to foreign countries*, they were purchased from citizens of Georgia for the purpose of exportation, they were in a port of the United States awaiting shipment, they had been inspected according to the laws of the state, and the purpose of the owners to export the logs was, after the levy of the tax thereon, actually carried out and the logs were exported.
>
> "It is clear, and it seems to be conceded by defendants, that if the logs had actually been on shipboard when the tax was levied, they might have well been considered exports. *Is the fact that they were still on land, though awaiting shipment, such a circumstance as deprives them of their character as exports?* The reasoning of the court in the case of Brown v. Maryland, 12 Wheat. (25 U.S.) 419, *demonstrates that it is not.*"

There is not a single decision of this Court which has considered Article I, Section 10, Clause 2 of the Constitution which has limited or circumscribed it as did the opinion of the Court below. On the contrary, all of the decisions of this Court which have considered the constitutional prohibition have given it a wide and liberal interpretation in order to effectuate the obvious intention of the framers of the Constitution

that exports should be free from state taxation. To that end, it has been held that the every phase and incident of an export such as bills of lading, charter parties and marine insurance are exempt from state taxation. See:

United States v. Hvoslef, 237 U.S. 1, 13;
Fairbanks v. United States, 181 U.S. 283, 292-3;
Thames & Mersey Insurance Company v. United States, 237 U.S. 19;
N. Y. and Cuba Mail S. S. Co. v. United States, (D.C., N.Y.) 125 Fed. 320.

The observation of Chief Justice Hughes, speaking for this Court in *Willcuts v. Bunn*, 282 U. S. 216, 228, in interpreting the first three of the above decisions, though dictum, is most pertinent:

> "Similarly, with respect to federal taxation of articles exported from any State, the constitutional inhibition gives immunity *to the process of exportation* and to the transactions and documents embraced in that process. Fairbanks v. United States, 181 U. S. 283; United States v. Hvoslef, 237 U. S. 1; Thames & Mersey Marine Insurance Company v. United States, 237 U. S. 19. *Only on that construction can the constitutional safeguard be maintained.*"
>
> *Willcuts v. Bunn*, 282 U. S. 216, 228.

Clearly, the delivery of the cement plant to the export forwarding agent was a phase of, and a necessary incident in,—indeed, an essential part of the process of, the exportation of the cement plant. It was purchased solely for the use of the foreign purchaser at

Medellin, Colombia, South America. In order to get it there, it was as essential and as necessary to move the entire cement plant from the plant site, as it was for the railroad common carrier to move it to the port of embarkation or the vessel to carry it to Colombia.

The Court below in its final decision held that the work of dismantling, packaging and loading on the cars of the railroad common carrier by the contractor common carrier was not the equivalent to delivery to a common carrier for transportation. The Court said:

> "The fact that the Bigge company was licensed as a common carrier in interstate and foreign commerce is not material, for it was not employed to perform the functions of such a carrier; it undertook only to dismantle and prepare the property for shipment. It cannot, therefore, be seriously contended that delivery of possession to Bigge was equivalent to delivery to a common carrier for transportation."
>
> 194 P. (2d) 527, 530 (R. 108).

The decision of this Court in *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, 92, 94, seems to us conclusive on this point. There, the appellant was engaged in several activities, among them loading and unloading ships. The excise tax of the State of Washington required payment of a percentage of gross income for the privilege of doing business in that state. Suit was instituted by the appellant to enjoin the Tax Commission from enforcing the tax on the ground that appellant's work in loading and unloading vessels was interstate and foreign

commerce. The suit was dismissed by the trial Court and the judgment affirmed by the Supreme Court of Washington. In reversing the latter judgment this Court, speaking through Justice Cardozo, said, in part:

> "Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination. A stevedore who in person or by servants does work so indispensable is as much an agency of commerce as shipowner or master.
>
> * * * * * * *
>
> "The business of loading and unloading being interstate or foreign commerce, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts."
>
> *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, 92, 94.
>
> Cf. *Joseph v. Carter & Weekes S. Co.*, 330 U. S. 422.

The California Supreme Court in support of its opinion cites *Cornell v. Coyne*, 192 U. S. 418. This was a case involving a tax on the manufacturers of filled cheese. Although the filled cheese was manufactured for export, this Court held that the manufacturing process was not commerce and with this conclusion we agree.

In comparing *Cornell v. Coyne*, supra, with the facts of our case, it is submitted that the two situations are not at all analagous. In the former, the filled cheese was not filled cheese until it was manu

factured, it was not *in esse*, it had yet to be brought into existence, it could not move in commerce as filled cheese until it had become filled cheese. In the instant case, however, the cement plant was already manufactured, it was in existence and nothing was required except to export it. The Constitution does not require a person to do an impossible act to qualify for the benefits granted under the Constitution. But to say, as the California Supreme Court said, when the cement is delivered to a railroad common carrier or any part thereof, it becomes an export is to impose an impossible condition. A cement plant requiring 123 carloads to transport it to the seaboard was not an object which could be delivered to a railroad carrier in its existing form. The question always considered by this Court is: *Was that which was done reasonably necessary to effect its exportation?* Certainly, there can be no doubt that the answer is in the affirmative in the instant case.

Then too, we come to the novel question raised by the California Supreme Court that an article, indivisible by its very nature, an entire, complete and operative cement plant, may be divisible for tax purposes. There is no argument that the contract of sale was not divisible. The foreign purchaser could not take 14 car loads (12%) and pay the domestic seller 12% of the price. Nor was a cement plant less 12% a cement plant. If this is to be the rule of law, every year in California at 12:00 o'clock noon on the first Monday in March and in every State in the United States on the day set for fixing the tax on

personal property, the tax assessors will be measuring the amount of oil which has not yet gone through the pipes into tank cars being loaded, the amount of grain which has not been loaded into the hold of boats being loaded, and in fact everywhere, it will be a matter of computing what has been loaded and what remains to be loaded. Automobiles sold for export may be already loaded on boats, but their wheels not yet loaded will be taxed as being a percentage of an automobile. What percentage of a steam shovel is its bucket? Just because an article is shipped in pieces and some parts of it move before others, is its unity destroyed? We think not and it is noteworthy that the California Supreme Court has not cited any cases to support this unusual holding.

This Court has held in a long and unbroken line of decisions that exportation commences with the first movement of the goods towards the sea. Clearly, the dismantling, packaging and loading operations of the contractor-common carrier was such a movement.

The Court below in its final decision gave controlling effect to the fact that the contractor-common carrier did not carry the cement plant other than from the plant site to the railroad tracks running alongside the plant. The opinion indicates that a different result might have been accomplished if the contractor-common carrier had moved the cement plant by truck to the port of embarkation.

At the time this exportation was taking place the United States was engaged in World War II. Railroad cars and shipping space were difficult to obtain

and only obtained by permits received from the federal government. At the time the contract was made with the contractor-common carrier it was considered that a possibility might occur in which an allocation of shipping space had been made and that no railroad cars would be available to transport it in time to meet the boat. Such an event never took place, but the contractor-common carrier was licensed and available to perform this function had it been necessary.

But the Constitution of the United States does not make the prohibition against a state tax on exports dependent upon the formalities with which the exportation is effected.

The view of the Court below is directly contrary to the recent decision of this Court in *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 82. This Court said in part:

> "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. *But the same degree of certainty may exist though no common carrier is involved.*"

The *Richfield* case, supra, 329 U. S. 69, 74, is one where the California Supreme Court adopted the same reasoning as in the instant case and on appeal was reversed by this Court. In that case oil was delivered to a vessel owned by the New Zealand government by the Richfield Oil Corporation at the docks of the oil company. A sales tax was imposed on the sale. The

California Supreme Court held that if delivery had been made to a common carrier, the cargo of oil would be exempt from the tax. This Court, in reversing the California Supreme Court said in part:

"The Supreme Court of California held that this provision (Article I, Section 10, Clause 2 of the Constitution) did not bar the tax because the delivery of the oil which resulted in the passage of title occurred prior to the commencement of the exportation. The court suggested, and the appellee concedes, that a different result might follow if the oil had been delivered to a common carrier; 'for then it would have been placed in the hands of an instrumentality whose sole purpose is to export goods, thus indelibly characterizing the process as a part of exportation.' 27 Cal. (2d) p. 153, 163 P. 2d p. 3. (p. 74.)

* * * * * * *

"We do not pursue the inquiry as to the validity of the tax under the Commerce Clause. For we are of the view that whatever might be the result of that inquiry, the tax is unconstitutional under Article 1, Section 10, Clause 2. (p. 75.)

* * * * * * *

"The requirement that foreign commerce be involved (Woodruff v. Parham, 8 Wall. (US) 123, 136, 19 L. ed. 382, 386) is met, for concededly the oil was sold for shipment abroad. (p. 78.)

* * * * * * *

"The fact that delivery to a common carrier for export gave the sale immunity in A. G. Spalding & Bros. v. Edwards, 262 U.S. 66, 67 L. ed. 865, 43 S. Ct. 485, supra, is seized upon as stating a rule that the process of exportation has not

started until such delivery has been made. And cases like Superior Oil Co. v. Mississippi, 280 U.S. 390, 74 L. ed. 504, 50 S. Ct. 169, are relied upon as indicating that delivery to the purchaser is not sufficient. That case arose under the Commerce Clause. Mississippi was upheld in its effort to tax a distributor or wholesaler who purchased gasoline and later took it to Louisiana for sale. The court said, p. 395, that although the course of business indicated the likely destination of the oil, it was 'in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes.' The court held, therefore, that the tax was not on goods moving in interstate commerce. But it added, p. 396, 'Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here.'

"*The certainty that the goods are headed to sea and that the process of exportation has started* may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. *But the same degree of certainty may exist though no common carrier is involved.* The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad. It is true, as the Supreme Court of California observed, that at the time of the delivery the vessel was in Cali-

> fornia waters and was not bound for its destination until it started to move from the port. *But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use.* It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. *The means of shipment are unimportant so long as the certainty of the foreign destination is plain.*" (pp. 82-83.)

In the instant case, upon passage of title to the foreign purchaser, delivery was not made to it as was the case in *Richfield Oil Corp. v. State Board*, supra. Delivery of the entire cement plant was made to an export forwarding agent and a contractor-common carrier, both of which were independent instrumentalities of commerce and acted only for the foreign purchaser under and by virtue of written contracts, the sole purpose of which was the exportation of the entire and complete cement plant.

The Court below intimates that the contractor-common carrier did not perform the functions of a carrier. Webster's New International Dictionary, Second Edition, Unabridged, 1944, defines carrier as follows:

> "carrier * * * 1. One who or that which carries, or conveys; * * *
>
> * * * * * * *
>
> 2. One (whether a single person, a group of persons, or a corporation) employed in, or engaged

in the business of, carrying goods for others for hire, as a porter or teamster; specif., a common carrier." (p. 411.)

It is true that the distance which the contractor-common carrier transported the cement plant was not great, i.e., from the place it was located on the plant site to the railroad tracks running alongside of the plant site; but certainly such transportation was but a link in the entire chain of transportation from the place where the plant was located as sold to its ultimate destination at Medellin, Colombia, South America. The distance of the carriage or the movement of the entire commodity is not the determining factor. The fact that movement has begun which has as its effect the beginning of exportation and which is subsequently carried out, is the fundamental requirement.

It is submitted that the very act which vested title in the foreign purchaser irrevocably committed the entire and complete cement plant to exportation as was pointed out in *A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66, 67. Indeed, we submit that the instant case cannot be distinguished from the *Spalding & Brothers v. Edwards* case upon which appellants relied in the Court below but which decision was neither referred to nor even cited in the opinion of the California Supreme Court in this case.

A. G. Spalding & Bros. v. Edwards, supra, involved the following facts. Delgado & Compania, a commercial firm in the City of La Guaira, Venezuela, ordered

Scholtz & Company, an export forwarding agent in New York, to buy for their account and risk a certain number of baseballs and baseball bats at a stipulated price. Scholtz & Company then purchased the required merchandise from the plaintiff, delivering to it a written export order directing the packing and marking of the goods, and that they be sent to the Atlantic and Caribbean Steam Navigation Company, an exporting carrier in New York. The plaintiff marked and delivered the goods as directed and was given a receipt by the carrier which it sent to Scholtz & Company, and which was exchanged by them for an export bill of lading in their own name. Scholtz & Company paid the plaintiff the agreed price and was later paid its commission by its principals.

The District Court and the Circuit Court of Appeals upheld the tax, but their judgments were reversed by this Court which, speaking through Justice Holmes, said, in part:

> "* * * The question is whether the sale was a step in exportation, assuming as appears to be the fact, that the title passed at the moment when the goods were delivered into the carrier's hands.
>
> "The fact that the law under which the tax was imposed was a general law touching all sales of the class, and not aimed specially at exports, would not help the defendant if in this case the tax was laid on articles exported from any State, because that is forbidden in terms by the Constitution (citing numerous cases). * * *. Articles in course of transportation cannot be taxed (citing cases). * * * So we return to the question that we

have stated. To answer it with regard to any transaction we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. As elsewhere in the law there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary. In this case, for instance, while the goods were in process of manufacture they were none the less subject to taxation if they were intended for export and made with specific reference to foreign wants. (Cornell *v.* Coyne, 192 U. S. 418. Heisler v. Thomas Colliery Co., 260 U. S. 245.) On the other hand no one would doubt that they were exempt after they had been loaded upon the vessel for Venezuela and the bill of lading issued. It seems to us that the facts recited are closer to the latter than to the former side, and that the export had begun.

"The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. *The expected and accomplished effect of the act was to start them for that port.*"

A. G. Spalding & Bros. v. Edwards, 262 U. S. 66, 68-69.

So, in the instant case, the delivery by the domestic seller to the export forwarding agent and the contractor-common carrier upon the payment for the entire and complete cement plant, passed the title to

the foreign purchaser and irrevocably committed it to exportation.

Justice Holmes, after the portion of his decision quoted above, continued:

> "* * * *The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result.* Getting the bill of lading stands no differently from putting the goods on board ship. Neither does it matter that the title was in Scholtz & Co. and that theoretically they might change their mind and retain the bats and balls for their own use. *There was not the slightest probability of any such change and it did not occur.* The purchase by Scholtz & Co. was solely for the purpose of Delgado & Cia. and for their account and risk. *Theoretical possibilities may be left out of account.*"
>
> *A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66, 69-70.

In the instant case, there were not even any theoretical possibilities. The foreign purchaser was not located in this country nor did it own the land on which the plant was located. The export forwarding agent and the contractor-common carrier, while they had possession, could not use it for purposes of their own. Applying the same reasoning to delivery to a railroad common carrier it might be said that the railroad would not deliver the export to the port of embarkation because it might take it elsewhere within the state and use it for purposes of its own. Or the steamship carrier might load it in San Francisco and

take it to Los Angeles instead of fulfilling its contract of carriage to South America. But as was said in *A. G. Spalding & Bros. v. Edwards*, supra, "*Theoretical possibilities may be left out of account.*" 262 U. S. 66, 70.

Judge Peter J. Shields, the trial judge, in a clear analysis of the facts as applied to this case, has this to say in part (R. 93-95):

> "In cases like this where goods have been purchased for exportation and action has been taken in execution of that purpose it is not a question of whether any particular thing has been done but of whether or not what has been done in furtherance of a contract of export has so far committed the goods to exportation that there is no reasonable probability that the proposed export will not be concluded; that there remains no reasonable question or hypothesis upon which their exportation can be doubted. I think that it can be said that when the tax was levied upon the materials in this case that it had become substantially certain that the mechanisms constituting the plant would be exported, as they subsequently were. This seems unquestionable when the facts as they existed March 5, 1945 are viewed from their several angles:
>
> "1. The materials of the plant became committed to export when the Bigge Company began dismantling the building. At that time the plaintiff had spent a great deal of time and effort in furtherance of his intention to export the whole plant. The firmness of its intention to export this property is shown by the fact that it would not commit itself to its purchase until it had obtained

a license permitting its export. It had paid for the property. Before the Bigge Company had attacked it the plant had been a complete manufacturing unit. Immediately thereafter it was in process of destruction as such; the complete demolition of the structure was certain, the plaintiff was under contract to take it down and remove it from the premises. The plant could not have been re-erected upon its existing site; the plaintiff did not own it. At that time it was certain that what had been the building would soon be a mass of parts. In the circumstances it was certain that they would come to be such at the time the Bigge Company first went to work.

"These parts when placed in some warehouse or laid out on some lot which the plaintiff might secure would be mere 'scrap' and of merely speculative value for any purpose except for the use for which they were purchased.

"I think that the payment for the property and proceeding to change it from parts in place of a complete building, into a mass of disconnected materials made the completion of the exportation economically imperative. This was not a mere preparation of the plant for exportation; by such action and change the parts had been started upon such transportation with the degree of certainty demanded by *Coe v. Errol* and the many cases which have endorsed it.

"In this case, stronger than in the Hughes Bros. case the first owner of the plant had been paid for his plant and it was at that time in the sole possession of the Plaintiff. Thus one source of uncertainty as to whether the purpose to export would be executed did not exist; the Kaiser

Company could not prevent it. The only contingency upon which the export would be abandoned after the demolition of the building had become assured was therefore, that the plaintiff would abandon his purpose and sell the parts here at a substantial loss, or re-erect the plant in California where the plaintiff was not engaged in business. This suggests an improbable hypothesis. There was not the slightest probability of any such change, and it did not occur." *Spaulding Bros. v. Edwards*, 262 U. S. 66.

"In reaching this conclusion I am not considering the shipment of the twelve per cent of the property which was later exported as this fact was not certain at the time the Bigge Company began taking the building down.

"2. If the exportation of the materials of the plant was not before assured, that became certain when the twelve per cent of the corpus of the building had been sent abroad. In support of this conclusion I repeat all of the elements of certainty of export mentioned above and in addition I cite this circumstance. Whatever possibility there might have been that after plaintiff had torn the plant down and carried the parts off the premises that it would sell them or re-erect them into a plant in California would be rendered extremely improbable when it appeared that it had kept here only a part of the materials of the plant which of course could not be sold as the materials from which a plant could be built or used to reassemble the old one.

"3. When the building was in process of demolition and twelve per cent of its parts had been exported the entire plant was in process of 'move-

ment toward the sea, as required by the source case of *Coe v. Errol*. The plant was a unit composed of many parts. It was of great size and weight and could only be moved through moving the parts as they were moved here. When the first shipments were made from the plant we would not say that the contractors were moving a beam or a brace; we would say that they had begun to move the plant, that the entire property was in process of moving. It could not be said as part after part of the plant had been moved down to the last rod or pulley, that what was left had remained unmoved in a very appreciable way every abstraction from the building affected what was left. If a body of stevedores had been hired to unload a ship, at their first movement we would not say that they were moving a piano, or a sack of wool, we would say that they were unloading the ship. In this case when the plaintiff exported twelve per cent of the plant and was in process of shipping the rest the movement of the whole plant toward the sea had begun, as in the Hughes Brothers case where the first logs were being 'pushed' into the stream the whole mass was being pushed in.

"For the reasons stated there could remain no reasonable doubt that at the time the tax was levied that the whole shipment would be made as it finally was.

"The means of shipment are unimportant as long as the certainty of the foreign destination is plain. *Richfield Oil Co. v. State*, supra. Where the Court finds from the 'circumstances' that an export trade had been actually intended and carried through the Court will be liberal in con-

> stating the manner in which the export had been executed. *Carson Petrol Co. v. Vial*, 279 U. S. 95."
>
> Opinion of trial judge. (R. 93-95.)

The law is not concerned with the means of shipment except to inquire whether the means chosen reasonably guarantees continuity of the export journey and foreign delivery in good faith.

It is submitted that the means selected in this case in the light of all the circumstances, satisfies that inquiry beyond all doubt.

> "There has been a liberal construction of what is continuity of the journey, in cases where the Court finds from the circumstances *that export trade has been actually intended and carried through.*"
>
> *Carson Petroleum Company v. Vial*, 279 U. S. 95, 105-106.

See, also:

> *Railroad Commission v. Worthington*, 225 U. S. 101, 108-111;
>
> *Western Oil Refining Company v. Lipscomb*, 244 U. S. 346, 349-350.

In the last case cited, the State of Tennessee sought to impose a privilege tax upon goods shipped into Tennessee from Indiana, the goods being shipped in cars to the plaintiff at Columbia, Tennessee, where a portion were delivered, and the remainder rebilled to the plaintiff at Mount Pleasant, Tennessee. The Supreme Court of the State held that no tax could be

levied upon the goods delivered at Columbia, but that the reshilling of the goods to Mount Pleasant constituted intra-state commerce. In reversing this decision, this Court said in part:

"Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one State to another a reshilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. *As this court often has said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive.* (Citing a great number of cases.)

"Here, when the cars were started from Illinois and Indiana, it was intended by the shipper, as is expressly conceded, that they should be taken to Columbia, Tennessee, where a portion—a definite portion—of the contents of each was to be taken out and delivered, and that the cars, with the remainder of the contents, should proceed to Mount Pleasant in the same State; *and this is what actually was done.*"

Western Oil Refining Company v. Lipscomb, 244 U. S. 346, 349.

Here, when the contracted common carrier began to dismantle and package the cement plant it was intended that it should be placed on the cars of the railroad carrier for transshipment to the port of embarkation where the cement plant would be reloaded on the

vessel to take the plant to Colombia, South America, *and that, in fact, was actually done.*

Clear as it seems to us that the exportation of the cement plant had commenced when the export forwarding agent and the contractor-common carrier had taken delivery and simultaneously began their respective integrated activities, it is not necessary even to maintain that proposition. At the time the tax was assessed, 14 carloads of the cement plant (12%) were on their way by rail and boat to their foreign destination.

In conformity with the rule of *Coe v. Errol*, supra, this Court has held in an unbroken line of decisions that exportation starts with the first movement of the goods towards the sea.

It is believed that more than ninety percent of the exports of this country are handled by export forwarding agents, and the administration of the California Sales Tax statute recognizes this fact and provides for the exemption from sales tax when goods are delivered to an export forwarding agent in the same manner as when delivered to a carrier.

Section 6352, California Revenue and Taxation Code, provides for exemption from sales taxes those taxes prohibited by the Constitution or laws of the United States to the same effect as Section 202, one of the sections herein involved. In connection with the administration of Section 6352, supra, the California State Board of Equalization issued Ruling No. 55, the pertinent parts of which are as follows:

"Interstate and Foreign Commerce.

"(a) Sales Tax. (1) Exempt Transactions.

"Sales tax does not apply to sales of property which is:

* * * * * * *

"(C) Shipped to a point outside this State, pursuant to the contract of sale, by delivery by the retailer to such point by means of (1) facilities operated by the retailer, (2) delivery by the retailer to a carrier for shipment to a consignee at such point, or (3) *delivery by the retailer to a custom's broker or forwarding agent for shipment outside this State.*"

It is submitted that there is no basis under the most technical of considerations that the sale of the entire and complete cement plant was a local transaction or that the means employed were other than reasonable and necessary to effect the cement plant's exportation.

The parties to the transaction had no other object than the exportation of the entire and complete cement plant from California to Colombia, South America. The contract, and the documents executed pursuant to the contract, required it, and the delivery of the cement plant to the export forwarding agent and the contractor-common carrier was just as much a part of the exportation process as was the carriage to the port of embarkation by the railroad common carrier and, the carriage to Colombia by the many vessels which carried it there.

In *Hughes Bros. Timber Co. v. Minnesota*, 272 U. S. 469, 475, this Court said in part:

> "Both parties intended interstate shipment, they had bound themselves to it, the logs were segregated and moving in the contemplated journey, which neither could prevent if they carried out their agreement. The delays in the continuity of movement were only incidental to the journey and the necessary change in the mode of transportation."
>
> *Hughes Bros. Timber Co. v. Minnesota*, 272 U. S. 469, 475.

And in *State of Texas v. Anderson, Clayton & Co.*, 92 Fed. (2d) 104, 107, the Circuit Court of Appeals said in part:

> "It is well settled that, in determining whether a particular movement of freight is interstate or intrastate or foreign commerce, the intention existing at the time the movement starts governs and fixes the character of the shipment."
>
> *State of Texas v. Anderson, Clayton & Co.*, 92 Fed. (2d) 104, 107.

In *Multnomah County v. Dant & Russell, Inc.*, 158 Ore. 350, 354, 75 P. (2d) 986, the Supreme Court of Oregon said in part:

> "The inhibition of the Constitution of the United States against tax upon exports relates particularly to sales by a citizen of this country to a citizen of some foreign country."
>
> *Multnomah County v. Dant & Russell, Inc.*, 158 Ore. 350, 354, 75 P. (2d) 986.

In *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 290, this Court said in part:

"On the same principle, where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation."

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 290.

And conclusive upon the question before us that delivery to a common carrier is not required before an export becomes exempt from taxation under the Constitution, this Court has consistently held that substance and not form governs. This Court in *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 662, 663, said, in part:

"For the purpose of determining whether petitioner was the importer in the constitutional sense, it is immaterial whether the title to the merchandise imported vested in him who caused it to be brought to this country at the time of shipment or only after its arrival here * * * For in determining the meaning and application of the constitutional provision, *we are concerned with matters of substance not of form*. When the merchandise is brought from another country to this, *the extent of its immunity from state taxation turns on the essential nature of the transaction, considered in the light of the constitutional purpose, and not on the formalities with which the importation is conducted or on the technical procedures by which it is effected.*"

Hooven & Allison Co. v. Evatt, 324 U. S. 652, 662, 663.

See, also, to the same effect:

Carson Petroleum Co. v. Vial, 279 U. S. 95, 103;

In re Globe Varnish Company (C.C.A.), 114 F. (2d) 916.

We submit that the four grounds upon which the California Supreme Court based its decision are wholly untenable, are both illogical and directly contrary to all of the applicable decisions of this Court, and if sustained, would defeat the manifest intent and purpose of the Constitution.

CONCLUSION.

From the inception of the negotiations, both parties to the transaction had but one thing in mind: the exportation of the entire and complete cement plant to Medellin, Colombia, South America. The negotiations proceeded to an agreement and a contract was written and executed. The property sold was identified with particularity as an entire, complete and operative cement plant which included the quarry equipment operated in conjunction with the plant itself as well as spare parts and supplies. It was sold in its then present condition and as it was then presently situated. The contract was not to be effective for any purpose if an export license was not obtained from the United States Government. Title to the cement plant was to pass immediately upon the occurrence of the following two conditions, namely: (1) The issuance of an export license, and (2) the establish-

ment of a letter of credit in payment for the cement plant. The contract also provided that upon passage of title to the purchaser, the domestic seller was to deliver possession to an export forwarding agent for shipment to the foreign purchaser in Colombia. The export forwarding agent in order to perform its duties entered into a written contract with a contractor to dismantle, package for export, and to load the entire cement plant on the cars of a railroad common carrier whose tracks ran alongside the plant site. This contractor was also licensed as a common carrier by motor vehicle.

On January 3, 1945, the export sales contract and all other contracts executed pursuant thereto became effective. Title passed to the foreign purchaser, the export forwarding agent took delivery from the domestic seller and the contractor-common carrier began performance under its contract with the export forwarding agent. On January 3, 1945, and thereafter until the entire cement plant had completely left the United States, every step taken by each of the parties —the filing of applications for railroad cars with the United States Office of Defense Transportation, the filing of applications for shipping space with the U. S. Maritime Commission, the preparation of bills of lading, export declarations, consular invoices, and other documents by the export forwarding agent were integrated with the activities of dismantling, packaging and loading on cars of the railroad common carrier, both of which were integrated with the activities of the railroad carrier and the steamship

carriers; and were all steps incident and necessary to and a part of the exportation of the cement plant.

The decision of the Court below, as we have pointed out, ignores the actualities of the case—that it was impossible for the foreign purchaser to prevent the exportation of the entire cement plant. At the very beginning, the cement plant was in the possession of an export forwarding agent and a contractor-common carrier and both of which had the sole duty to effect its exportation. On tax day, the entire cement plant was then in the hands of and in the various stages of movement as required for exportation of the plant; i. e., part of the plant was loaded on the steamship carrier, part of the plant was loaded on the cars of the railroad carrier, and the balance of the plant was in the hands of the export forwarding agent and the contractor-common carrier.

And with that situation existing, to say that because 14 carloads, out of 123 carloads required to export the plant had been delivered to the railroad carrier and were outside Merced County, that the tax which was originally assessed on the whole of the plant is valid when reduced by 12%, is we believe, to disregard entirely the Constitution and, in effect, to nullify its provisions.

We respectfully submit that we have sustained each and every assignment of error, all of which are summarized in our twentieth and final assignment, that:

"The Supreme Court of the State of California erred in its final judgment in the above entitled

cause in reversing the judgment of the Superior Court of the State of California."

We respectfully submit that the judgment appealed from should be reversed.

Dated, Oakland, California,
January 17, 1949.

SCOTT D. KELLOGG,
Counsel for Appellants.

(Appendix Follows.)

Appendix

The following are the applicable provisions of the California Constitution and California Revenue and Taxation Code, as amended, and as in effect at the time of the assessment of the personal property tax on March 5, 1945, other than Sections 5136, 5137, 5138, 5139, and 5141, which deal with the procedure by which an improperly or invalidly levied tax could be recovered and which are set forth as they existed at the time of the filing of the appellants' protest and complaint. The appendix was submitted to counsel for appellees before being printed and counsel for the appellees have advised counsel for appellants that appellees agree that the following sections are the applicable portions of the statute.

"Section 1. All property in the state except as otherwise in this constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, . . . The word 'property,' as used in this article and section, is hereby declared to include . . . and all other matters and things, real, personal and mixed, capable of private ownership; . . ."

Section 1, Article XIII, Constitution of California.

"§ 103. 'Property' includes all matters and things, real, personal, and mixed, capable of private ownership.

"§ 104. 'Real estate' or 'real property' includes:

"(a) The possession of, claim to, ownership of, or right to the possession of land.

* * * * * * *

"(c) Improvements.

"§ 105. 'Improvements' includes:

"(a) All buildings, structures, fixtures, and fences erected on or affixed to the land, except telephone and telegraph lines.

* * * * * * *

"§ 106. 'Personal property' includes all property except real estate."

Deering's Revenue and Taxation Code of California, 1944 edititon, pp. 6 and 7.

"§ 201. All property in this State, not exempt under the laws of the United States or of this State, is subject to taxation under this code.

"§ 202. The exemption of the following property is as specified in Section 1 of Article XIII of the Constitution:

* * * * * * *

"(e) Property that is exempt under the laws of the United States."

Deering's Revenue and Taxation Code of California, 1944 edition, pp. 14 and 15.

"§ 405. Annually, the assessor shall assess all the taxable property in his county, . . . to the persons owning, claiming, possessing, or controlling it at 12 o'clock meridian of the first Monday in March. . . ."

Deering's Revenue and Taxation Code of California, 1944 edition, p. 25.

"§ 5136. After taxes are payable, any property owner may pay the taxes on his property under protest. A payment under protest is not a voluntary payment.

"§ 5137. The protest shall be in writing, specifying:

"(a) Whether the whole assessment is claimed to be void or, if only a part, what portion.

"(b) The grounds on which the claim is founded.

* * * * * * *

"§ 5138. Within six months after the payment, an action may be brought against a county or a city in the Superior Court to recover the taxes paid under protest.

* * * * * * *

"§ 5139. The action may be brought only:

"(a) As to portion of the assessment claimed to be void.

"(b) On the grounds specified in the protest.

"(c) By the owner, his guardian, executor, or administrator.

* * * * * * *

"§ 5141. If the court finds that the assessment complained of is void in whole or in part, it shall render judgment for the plaintiff for the amount of the taxes paid on so much of the assessment as is found to be void. In such event but only where taxes are paid after the effective date of this act, the plaintiff is entitled to interest on the taxes for which recovery is

allowed at the rate of 5 per centum per annum from the date of payment under protest to the date of entry of judgment, and such accrued interest shall be included in the judgment. The taxes paid on so much of the assessment as is not found to be void shall constitute valid taxes which, if paid after delinquency, shall carry penalties, interest and costs."

Deering's Revenue and Taxation Code of California, 1944 edition, pp. 217, 218 and 219.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 327

EMPRESA SIDERURGICA, S. A., a corporation of Colombia, South America, and VANDERBURGH & CO., INC., a California corporation,

Appellants,

vs.

COUNTY OF MERCED, a municipal corporation, J. EMMETT MCNAMARA, Assessor of the County of Merced, et al.,

Appellees.

APPELLANTS' REPLY BRIEF.

SCOTT D. KELLOGG,
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Appellees.

APPELLANTS' REPLY BRIEF.

In replying to appellees' brief, we shall refer to our opening brief by the letter B and to appellees' brief by the letters AB. In the argument for brevity we shall sometimes refer to Clause 3, Section 8, Article I, of the Constitution as the commerce clause; to

Clause 2, Section 10, Article I, either as the export clause or the import-export clause; to Clause 5, Section 9, Article I, as the federal export clause. As all of the applicable provisions of the Constitution are in Article I, when we refer to them by clause and section we shall omit the article.

Also, as in our opening brief, we shall refer to appellant Empresa Siderurgica, S. A. as the foreign purchaser, appellants Vanderburgh & Co., Inc. as the export forwarding agent, Henry J. Kaiser Company as the domestic seller, Bigge Drayage Company as the contractor-common carrier, and The Atchison, Topeka and Santa Fe Railway Co. as the railroad common carrier.

All emphasis through this brief will be ours, unless it is indicated that italics are those of the text.

INTRODUCTORY STATEMENT TO APPELLANTS' REPLY TO APPELLEES' ARGUMENT.

Clause 2 of Section 10 in the most clear and explicit language prohibits any state without the consent of Congress from levying any tax or impost upon imports or exports. The clause by the clear language of the Constitution is an additional limitation upon the states not contained in the Commerce Clause, and was *precisely so intended by the framers of the Constitution.*

In the few cases which have been considered by this Court, clear and concise rules have been set forth

from which it may be readily determined whether or not the property intended for exportation has in fact become committed to exportation and is therefore an export within the meaning of the export clause. These principles may be summarized as follows:

1. It must be in existence.

2. It must be identified with reasonable certainty.

3. There must be a present intent to export it.

4. It must start to move in foreign commerce in good faith.

5. It must be exported.

Appellees do not challenge the fact that the cement plant was in existence, that the contract of sale identified the cement plant or property to be exported, that it was intended to export the cement plant, or that it was finally so exported. We believe, therefore, that the sole ultimate question in the case is whether or not a movement of part of the cement plant pursuant to a reasonably planned method of exportation which was actually expeditiously carried out in good faith, committed the entire cement plant to exportation.

Appellees in their statement of the case take issue with the fact that the cement plant was an entire, complete and operative cement plant and infer that Exhibit "B" attached to the contract of sale included items necessary to the operation of a cement plant. The complete answer to this position on the part of

appellees is Exhibit "B" itself and it is set forth in full in the appendix to this reply brief. Further than that, the contract with Bigge Drayage Company is replete with references to the methods to be used in dismantling in order that the cement plant could be readily reassembled at its destination. And then, of course, the export sales contract provides: "Seller represents that said cement plant was being operated until July 1, 1944, that Seller purchased said cement plant from its former operator in operating condition as of that time, and Seller warrants that it has not thereafter sold or removed any equipment or property from said cement plant except that listed in 'Exhibit B' ". (R. 25.) Furthermore, the export license recites that the articles and materials "constitute the total known requirements for this cement manufacturing plant". (R. 63.)

Appellees state that appellants' statement "the exportation of the cement plant was the only act to be done upon the consummation of the sale" is not correct for the record clearly shows that the property was sold in an undismantled condition. Truly the cement plant was sold in an undismantled condition. In fact the contract of sale states:

> "Whereas Purchaser has completely inspected and is fully familiar with said cement plant in its present condition and location and is desirous of buying said cement plant, with certain specific exceptions hereinafter mentioned in its present condition and as presently situated, for the purpose of exporting the said plant to the Republic of Colombia." (R. 23-24.)

While it is apparent that it was difficult to export an undismantled cement plant, nevertheless the one and only problem presented was its exportation. Whether the means selected were reasonably calculated to accomplish its exportation has been heretofore discussed in appellants' opening brief and will be hereafter amplified in this reply brief.

Appellees take exception to the designation of Bigge Drayage Company as "contractor-common carrier". It is, of course, true that Bigge Drayage Company was licensed as a common carrier of interstate and foreign commerce by the United States Interstate Commerce Commission. It is also true that Bigge dismantled and packaged the cement plant. Whether or not it acted as a common carrier, a contract carrier, or merely a contractor, his function, as pointed out in appellants' opening brief was one of the first steps and we emphasize necessary steps in the exportation of the cement plant.

APPELLANTS' REPLY TO APPELLEES' ARGUMENTS.

I.

APPELLEES' ARGUMENT THAT NONE OF THE PROPERTY TAXED HAD AN EXPORT STATUS ON TAX DAY IS BASED UPON AN ERRONEOUS APPLICATION OF THE FACTS.

An examination of the record reveals that the property sold to the foreign purchaser was a cement plant and that on tax day 14 carloads had left the County of Merced enroute by rail and boat to South America. And so appellees state that because the Board of

Supervisors of Merced County reduced the tax by 12%: "None of the property here taxed had been * * * started upon such transportation in a continuous route or journey." (A.B. 12.)

Appellees desire to disregard entirely that part of the property sold for export was moving by boat and railroad and that the activities of the export forwarding agent and the contractor-common carrier were integrated and an essential part of such movement.

Appellees state that all of the property taxed was still located at the plant site on tax day, March 5, 1945. What they mean is that a credit of 12% was given to appellants because 14 carloads had left the county and could not be taxed under any theory of law, and they then computed that the 88% of the plant which had not yet been loaded on railroad cars was still in the county and therefore taxable. But in what shape was that 88%. The process of exportation started on January 3, 1945, when title passed to the foreign purchaser and the export forwarding agent took delivery. In the two months which elapsed, 56% of the plant had been dismantled and of that 56% 14 car loads (12%) had been shipped, and 10% had been crated and packed. 44% had not been dismantled. But on tax day operations did not stop. For the period March 14, 1945, through March 21, 1945, 12 car loads left the county. (R. 85-86.) And continuing thereafter dismantling, packaging, and railroad shipments continued without cessation until the entire cement plant, the property sold to the foreign pur-

chaser, had completely left the County of Merced on its way to South America.

Appellees make much of the fact that 44% of the plant had not been dismantled. The answer is that the process of dismantling was proceeding with due diligence before tax day and continued expeditiously without cessation after tax day pursuant to the export sales contract and the contract with the Bigge Drayage Company. It was an integral part of the export process.

Citing *Coe v. Errol*, 116 U. S. 517, appellees argue that the activities of Bigge Drayage Company was preparation for shipment. Yet in *Coe v. Errol*, supra, not one log was moving. "There they were to remain *until it should be convenient* to send them to their destination." (p. 528.)

It could have been just as easily said that there they were to remain until it should be convenient to *sell them locally*.

Is that the instant case? By no stretch of the imagination are the cases analogous.

Further citing *Coe v. Errol*, supra, appellees disregard the clear and concise language employed by disregarding that part of the quotation at page 528 (A.B. 13-14) where it specifically says that this movement does not begin until the articles have been "started for transportation from the one State to the other." Can there be any question whatever that the cement plant had started to move as an article of commerce before tax day? We submit that there can be

no question and that movement had started far and beyond that required by the leading case of *Coe v. Errol*, supra.

Cornell v. Coyne, 192 U. S. 418, is cited by appellees in comparing the process of exportation by Bigge Drayage Company to that of manufacturing filled cheese.

An analysis of the two situations quickly reveal that they are not analogous. The manufacturing process brought into existence the filled cheese. Certainly it could not be an article of commerce until it was brought into being. However, in the instant case, the cement plant had already been manufactured. It was in being—there it stood in its undismantled condition—and upon the payment by the foreign purchaser to the domestic seller, title passed, delivery was taken by the export forwarding agent, and Bigge Drayage Company began the process of exportation by dismantling, packaging, and carrying it to the railroad spur and loading it on the railroad cars. What other manner could have been selected to export the cement plant? We submit that everything reasonably necessary for the exportation of the cement plant was done and that all actions taken were for one and only one purpose—that of exportation.

We cannot believe that appellees seriously believe that the raising of cattle, although later exported, can be compared to the process of exportation in which the Bigge Drayage Company was engaged. The portion of the decision in *Cornell v. Coyne*, supra, quoted by

appellees (A.B. 15) is easily answered. The cattle had not yet begun to move as articles of commerce. However, place the cattle which have been sold for export in a corral by a railroad track and when the first steer starts into the first car, it is respectfully submitted, that this is sufficient movement in commerce to commit the entire corral of cattle to exportation. And further, that if 12% of the cattle are loaded on railroad cars by noon on the first Monday in March in California, the balance of 88% in the corral are exempt from taxation under the export clause of the Constitution. Truly, by the very nature of things, they do not move all at one time.

Heisler v. Thomas Colliery Co., 260 U. S. 245, is cited by appellees as lending support to their position. Again, as in *Coe v. Errol*, supra, no part of the coal had started to move.

Appellees, again referring to *Cornell v. Coyne*, supra (A.B. 16-17), observe that dismantling involves preparatory activities in advance of shipment as does manufacturing. They refer to the substantial sum paid to Bigge Drayage Company for this work. Again we emphasize that the work of Bigge Drayage Company was so integrated with the work of the export forwarding agent, the carriage by the railroad and steamers that it was one continuous movement, each doing the work delegated to it to effect the exportation of the cement plant. It is not believed that the substantial sum paid to Bigge is indicative of anything other than that the project was one of great magnitude.

Coming next to the assertion by appellees (A.B. 17-18) that the record does not justify the statement by appellants that nothing was required to be done with the cement plant except to export it. As heretofore stated, the record shows conclusively that the cement plant was purchased at its then present location and as it was situated. It was needed in Colombia, South America in the form that it was purchased. It was a plant of great magnitude, requiring 123 car loads to transport it to the seaboard. The foreign purchaser provided for delivery of the plant in that condition to an export forwarding agent for shipment to it in South America. This is not an unusual situation. It is the custom in foreign trade for the foreign purchaser to instruct the seller to deliver the goods purchased to a designated export forwarding agent. The export forwarding agent, upon being designated by the foreign purchaser, takes such steps as are reasonably required to effect the exportation of the article. In the instant case, the export forwarding agent, was required to employ Bigge Drayage Company as part of the process of exportation. This again is not unusual, for many manufacturers do not have the facilities to package their products for export and in such cases, an export forwarding agent, upon being designated by a foreign purchaser to ship goods to him will instruct the domestic seller to deliver his products to an export packer as part of the export process.

In *Richfield Oil Corp. v. State Board*, 329 U. S. 69, cited by appellees, we believe, confirms the position of appellants. This Court said in part:

> "But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use." (p. 83.)

In the instant case, not only when the export forwarding agent and Bigge Drayage Company took delivery and began the work of dismantling but also when 14 carloads had left Merced County, there was nothing equivocal in the transaction which created even a probability that the cement plant would be sold locally.

This Court went on to say:

> *"The means of shipment are unimportant so long as the certainty of the foreign destination is plain."*
>
> *Richfield Oil Corp. v. State Board*, 329 U.S. 69. 83.

On pages 18 and 19 of appellees' brief, there is found a statement, which is believed to be misleading. Instead of dealing with the property (the cement plant in its entirety) as described in the contract of sale, appellees disregard entirely the part which was shipped. They say that because the tax was reduced by 12% because 14 car loads were shipped prior to tax day "that all of the property taxed was still at the plant site". To obtain a clear picture of that which

occurred, 14 carloads out of 123 carloads were on their way to South America by rail and boat. 109 carloads out of 123 carloads were in the process of exportation; that is, that which had not yet been dismantled was being dismantled, that which had not yet been crated and packaged was being crated and packed and that which had not yet been loaded on railroad cars was being loaded. Then appellees say: "None had been loaded on railroad cars or even placed in the possession of the Atchison, Topeka and Santa Fe Railway Company which was to carry the property from the plant site to the port of shipment." It would seem that a more accurate statement could be made. The record reveals that during the month of March, 1945, 20 carloads were billed and shipped by rail. (R. 85-86.) 6 cars were being loaded on tax day. (R. 84A.) It seems that by reducing the tax by an arbitrary percentage to attempt to compensate for shipments already completed on only part of an entire transaction, that appellees may then come before this Court and say none of the property has been started on its journey. Certainly there is no question but that 14 carloads had started on the journey and the balance were started as quickly as it was physically possible so to do.

Cornell v. Coyne, 192 U.S. 418, is again referred to by appellees (A.B. 19) after reasoning that none of the property had commenced the foreign journey, and therefore is subject to the tax. This erroneous assumption on the part of appellees induced by the fact that the tax was reduced by 12% can only and does lead them to a false conclusion. *Cornell v. Coyne*,

supra, is authority for the principle that exports are not relieved from the *prior* ordinary burdens of taxation. (p. 427.)

And on page 20 of their brief, appellees confirm that the California Supreme Court in this case, disregarded the fact that 14 carloads were moving in commerce as part of the entire export transaction by reason of the 12% reduction of the tax and arrived at the erroneous conclusion that none of the property was moving in export, and upon these erroneous conclusions applies the tests laid down in *Richfield Oil Corp. v. State Board*, 329 U.S. 69.

We submit that the California Supreme Court has held and appellees seek to have this Court hold that it is permissible for a county on tax day to reduce by an arbitrary percentage a tax on an export in the process of being exported and by reason thereof, he may disregard that which has already been shipped as committing the goods to exportation and tax the balance as being part of the general mass of property in the state, because that part of the export has not started to move. Appellees have not cited and we are not aware of any decision of this Court which justifies such a result.

II.

APPELLEES' ARGUMENT THAT AN INTENT TO EXPORT PROPERTY DOES NOT CONFER UPON THE PROPERTY AN EXEMPT STATUS AND NEITHER DOES THE EXISTENCE OF A CONTRACT OF SALE OF PROPERTY TO BE EXPORTED TAKE INTO CONSIDERATION THE OVERT ACTS WHICH COMMITTED THE ENTIRE CEMENT PLANT TO EXPORTATION.

There is no question but that mere intent to export property even under a contract of sale, without more, does not commit goods to exportation.

See:

Cornell v. Coyne, 192 U.S. 418;
Heisler v. Thomas Colliery Co., 260 U.S. 245;
Coe v. Errol, 116 U.S. 517.

But where there is a contract of sale and an intent to export property, coupled with the overt acts of starting the property on its journey, the subject of the sale in its entirety becomes an export and is not taxable.

See:

Richfield Oil Corp. v. State Board, 329 U.S. 69;
A. G. Spalding & Bros. v. Edwards, 262 U.S. 66.

This is the applicable principle in the instant case. Concisely the factors involved are as follows:

1. The export sales contract was executed by domestic seller and foreign purchaser for the purchase of a cement plant.

2. The contract intended shipment to Colombia, South America.

3. An export forwarding agent was designated to take delivery.

4. The export forwarding agent employed a contractor-common carrier to dismantle, package and load the cement plant on railroad cars.

5. An export license was obtained permitting the exportation.

All of the above were preparations for export and without more no export would arise. However, the following did take place before tax day, March 5, 1945.

6. Payment for the entire cement plant was made by foreign purchaser to domestic seller.

7. Title passed to foreign purchaser.

8. Export forwarding agent took delivery.

9. Contractor-common carrier began dismantling, packaging and loading the cement plant on railroad cars.

On tax day, March 5, 1945, the assessor of Merced County assessed a personal property tax on the whole of the cement plant, notwithstanding the fact that 14 carloads had begun their journey to the sea, two of which had been already loaded on a boat to take them to South America. After tax day:

10. The continued activities of the export forwarding agent, the contractor-common carrier, the railroad carrier, and the steamship carrier consisted of one integrated movement of the ce-

ment plant until the whole of the plant had been shipped out of the County of Merced and out of the United States.

11. The County of Merced reduced the tax 12% by reason of the 14 carloads which had been shipped.

Clearly this is more than a mere intention to export. The degree of certainty that the process of exportation had started as required by *Richfield Oil Corp. v. State Board,* 329 U.S. 69, 82-83, could have no better illustration.

> "* * * The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result."
>
> *A. G. Spalding & Bros. v. Edwards,* 262 U.S. 66, 69.

Appellees pose the question of a foreign purchaser contracting with a seller in this country to furnish a giant telescope. The answer is that it is a contract to manufacture for export and it does not become an export until after it has been completed and started to move as an article of commerce. *Cornell v. Coyne,* 192 U.S. 418. However, suppose a foreign purchaser wished to buy the telescope at the Lick Observatory on Mount Hamilton. We would have an article already manufactured and in existence and when it started to move as an article of commerce to the foreign purchaser, it would be an export and exempt from taxation under the export clause.

III.

APPELLEES' ARGUMENT THAT EMPLOYMENT OF A DISMANTLER AND A FORWARDING AGENT DID NOT CONFER AN EXEMPT STATUS UPON THE PROPERTY TAXED OVERLOOKS ENTIRELY THE FUNDAMENTAL CONCEPT THAT THE PROCESS OF EXPORTATION STARTS WITH THE FIRST MOVEMENT TOWARD THE SEA.

(a)

Apparently appellees have misconceived the appellants' position that it is not necessary that a common carrier be utilized in the exportation of goods. The fact that Bigge Drayage Company was also a common carrier does not detract from its activities in dismantling the cement plant. Nevertheless on page 43 of our opening brief we said:

> "This Court has held in a long and unbroken line of decisions that exportation commences with the first movement of the goods towards the sea. Clearly, the dismantling, packaging and loading operations of the contractor-common carrier was such a movement."

And on page 44:

> "But the Constitution of the United States does not make the prohibition against a state tax on exports dependent upon the formalities with which the exportation is effected."

And in the recent case of *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 82, this Court held that although the certainty that goods are headed to sea and the process of exportation has started may normally be best evidenced by the fact that they have been de-

livered to a common carrier for that purpose, *"the same degree of certainty may exist though no common carrier is involved."* (p. 82.)

Appellees state (A.B. 25) that one of the vital features of the case is the necessity of dismantling and packaging before shipment could occur. It is the position of appellants that the dismantling and packaging were a necessary part of the exporting process. It is very true that no exportation could be had of the cement plant as it was located and in its condition without the employment of a dismantler and packer. Therefore, the employment of Bigge Drayage Company was relevant and appropriate to effect the cement plant's exportation.

> "The expected and accomplished effect of the act was to start them for that port."
>
> *A. G. Spalding & Bros. v. Edwards,* 262 U.S. 66, 69.

Appellants cannot overlook the statements by appellees that none of the property assessed, by March 5, 1945, had been delivered to a common carrier for transportation. (A.B. 26.) Again it is pointed out that the assumption is based upon a credit of 12% of the tax to compensate for the 14 carloads which had been delivered to the railroad common carrier prior to March 5, 1945.

Appellees state (A.B. 26) that "This Court in referring to delivery to a common carrier obviously meant delivery to one who *in the particular situation*

involved was performing the functions of a common carrier." It is well recognized that this Court chooses its language with care and if such were the intent of this Court, it is believed that such language would be employed. This, we believe, is a narrow construction and not within the liberal interpretation accorded export situations by this Court.

See:

Carson Petroleum Company v. Vial, 279 U.S. 95, 105-106.

On almost every page of appellees' brief we are met with the proposition that none of the property taxed had been delivered to the railroad. We repeat that on tax day 14 carloads had been delivered to the railroad and the only justification for such statements is the fact that the tax on the entire cement plant was reduced by 12%.

The law is not concerned with the means of shipment except to inquire whether the means chosen reasonably guarantees continuity of the export journey and foreign delivery in good faith. Considering the size of the project, we are unable to visualize any other manner of effecting the export by other means.

"*There has been a liberal construction of what is continuity of the journey,* in cases where the Court finds from the circumstances that export trade has been actually intended and carried through."

Carson Petroleum Company v. Vial, 279 U.S. 95, 105-106.

(b)

It is the position of appellants that delivery of goods to an export forwarding agent which has as its purpose the exportation of goods and that the goods as a result of that delivery start to move to a foreign destination as an article of commerce, that such delivery is one of the steps in the process of exportation. This position is exactly contrary to that taken by appellees. (A.B. 28-29.)

Naturally it assumes that the export forwarding agent will follow his calling and not be a manufacturer. If he act as a manufacturer he is not an export forwarding agent. This point raised by appellees (A.B. 29) is without merit.

Appellants take exception to the statement by appellees that it asks this Court to go far beyond the boundaries of any decision which it has rendered on the subject. (A.B. 29.) Appellants believe that if this Court reverses the California Supreme Court and affirms the trial Court that it will reaffirm its consistent position with respect to exports as it did in *Richfield Oil Corp. v. State Board*, 329 U. S. 69.

IV.

APPELLEES' ARGUMENT THAT SHIPMENT PRIOR TO TAX DAY OF A PORTION OF THE PROPERTY SOLD TO A FOREIGN PURCHASER DID NOT CONFER EXEMPTION UPON THE PROPERTY STILL REMAINING IN THE COUNTY ON TAX DAY IS CONTRARY TO THE DECISIONS OF THIS COURT.

This is one of the major points of the instant case. It is the position of appellants that on January 3, 1945, the entire cement plant became an export. On this date delivery was taken by the export forwarding agent; the Bigge Drayage Company began to dismantle, package and load the plant on the cars of the railroad common carrier. This overt act, coupled with the continuity of activity subsequent thereto by the integrated operation of the export forwarding agent, contractor-common carrier, railroad common carrier, and the steamship lines which resulted in the completion of shipment of all of the cement plant out of Merced County, the State of California, and the United States, committed the cement plant to exportation. It is true that on tax day, March 5, 1945, that 14 carloads had left the County of Merced and that a total of 123 carloads was necessary to effect the exportation of the cement plant. That on tax day less than half of the cement plant or approximately 44% had not yet been dismantled. However, the dismantling and other operations were progressing diligently and expeditiously.

Property to be shipped, by its very nature, does not move simultaneously and it would be a very strained construction if this were required. Cattle in corrals at the railroad siding are not loaded all at

once. Grain in granaries at the railroad siding are loaded by chutes and it is elementary that some grain will be loaded first and the last grain loaded will start to move some time afterward.

Take for example the situation in *Richfield Oil Corp. v. State Board*, 329 U.S. 69. In appellant's opening brief in the *Richfield* case in the statement of the case it is related that two cargoes of oil was the export. (p. 19.) As soon as the "Nucla" had docked and was ready to receive the oil, Richfield started pumping it from the storage tanks which were located at the docks into the "Nucla" and continued steadily and without interruption until the entire cargo was delivered. (p. 21.) It is not indicated how long the pumping operations took, but without a doubt there was some lapse of time. This Court said in part:

> "* * * Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad."
>
> *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 82.

Certainly when the first oil came out of the storage tank into the hold of the boat that was the commencement of exportation and committed the entire cargo sold to exportation. Similarly, when the cement plant was delivered to the export forwarding agent and Bigge Drayage Company began to dismantle the plant, this too was the commencement of exportation and committed the entire plant to exportation.

Appellees seem to feel that there must be transportation or carriage before exportation begins. While transportation or carriage must be had at some stage of exportation, it is not necessary that it be the very beginning. The primary question is always whether the means chosen reasonably guarantees delivery to the foreign destination in good faith. As was said by this Court in *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 83:

> "* * * *The means of shipment are unimportant so long as the certainty of the foreign destination is plain.*"

It is regretted that appellees persist in distorting the facts. On page 30 of their brief, they infer that the property sold was not an entire, complete and operative cement plant. For the convenience of the Court and appellees in settling this question, Exhibit "B" is set forth in full in the appendix to this brief. And as heretofore shown, the record is replete with references to the reassembling of the plant, match-marking the parts, taking photographs before and after dismantling in order that the plant might be more easily reassembled, the employment of a consulting engineer and many other references as to the purpose for which the plant was purchased.

Appellees argue that the trial Court assumed in the case of *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469 that not all of the logs were moving on tax day and refer to the record in the case which is not disclosed by the decision itself. We submit that the language of this Court is not ambiguous and that the

rule stated therein is sound and the assumption by the trial judge drawn from the case, if not technically accurate, represents the true rule.

If part of the property sold moves in commerce the entire property sold is committed to that commerce.

Appellees again revert to the fact that the property was divided on tax day for tax purposes. Can it be said that an article is divisible physically as appellees here state (A.B. 33) if by capricious and arbitrary action of the Board of Supervisors of Merced County which passes a resolution almost six months after tax day, the effect of which is to reduce a tax by 12% when the tax should have been canceled completely.

It is not believed that appellees seriously believe that appellants contend that oil in place in the ground or timber standing in the forest is to be exempt because of the existence of an export sales contract.

We cannot help but become alarmed at this new device to tax exports by allocating a percentage to that which is loaded on a railroad common carrier and taxing the balance which is in the process of exportation.

Exception is naturally taken to the broad statement by appellees that we have not been able to cite any cases directly supporting our position. (A.B. 34.) Appellants submit that the California Supreme Court and appellees have distorted the plain facts in order to arrive at their most remarkable and novel conclusion.

V.

APPELLEES' ARGUMENT THAT MOVEMENT SUCH AS WAS INVOLVED IN THE DISMANTLING OF THE PROPERTY WAS PRELIMINARY OR PREPARATORY IN NATURE AND WAS NOT THE FINAL MOVEMENT OUT OF THE STATE LAUNCHING THE PROPERTY UPON ITS JOURNEY TO A FOREIGN DESTINATION IS CONTRARY TO THE PRINCIPLES LAID DOWN BY THIS COURT.

At the outset of appellees' argument under this heading, we are again met with the claim that it is inaccurate to infer that any of the property taxed had been loaded on the railroad cars.

Appellees are apparently under the impression if they repeat this misstatement often enough, it will be believed. Exhibit 12 attached to Stipulation and Agreed Statement of Facts (R. 85) sets forth with particularity the reason for the reduction of the tax by 12%. We quote: "same being for assessment reduction made because 14 cars of machinery were shipped prior to March 5, 1945,". (From resolution of Board of Supervisors.)

The undismantled portion of the plant is compared by appellees (A.B. 35) to coal which had not been mined or oil which still was in the ground or timber which had not been cut. Naturally they are not comparable. The cement plant is in existence and reduced to possession and ownership and is an article of commerce. The other products mentioned in their natural state are not so reduced and are not articles of commerce until so reduced.

And again appellees say (A.B. 35) "none of which had been loaded on the railroad cars at the plant site."

Appellees wish to forget that 14 carloads had been loaded at the plant site and more cars were continued to be loaded.

Appellees pose a question where grain is sold to a foreign purchaser, and asks three questions (A.B. 35) to which they say the answer is no. We submit that the correct answer is: "It all depends."

In *Richfield Oil Corp. v. State Board*, 329 U. S. 69, 82, this Court in quoting *Superior Oil Co. v. Mississippi*, 280 U.S. 390, said:

> "* * * But it added, p. 396, 'Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here.'"

As heretofore been demonstrated that once an article is in existence it may move as an article of trade and become committed to exportation. That preliminary movements and preparation for export are those movements and preparations where it cannot be said with certainty that the intended export will be exported. When it may be said that the certainty of foreign destination is plain and assured, it may then be said that the article or commodity sold is committed to exportation, and this is true even though the entire commodity has not had a chance to move in its entirety. *Richfield Oil Corp. v. State Board*, 329 U. S. 69, 82-83.

Appellees again cite *Coe v. Errol* (A. B. 36) as an example of preparation. Truly this is a very good example. None of the logs were moving in commerce.

Appellees again cite *Cornell v. Coyne* (A. B. 36) as another example of preparation. Manufacturing as we have heretofore shown is for the purpose of bringing into existence an article of trade. Until it becomes such an article it certainly cannot become committed to exportation.

Again appellees repeat "none of the property tax had been loaded on the cars of the railroad." (A. B. 36-37.) 14 car loads had been loaded for which the county arbitrarily reduced the tax 12% instead of canceling the tax.

VI.

APPELLEES' ARGUMENT THAT NO QUESTION OF VALUATION IS PRESENTED IS CONCEDED.

Appellees state (A. B. 37): "Appellants make statements with respect to valuation which we believe do not require an extended answer."

We are not aware of any statements made in appellants' opening brief with respect to valuation nor do appellees refer to any specific page where such statements occur.

The only complaint appellants have with respect to the proceeding before the Board of Supervisors of the County of Merced is that when it was pointed out that the cement plant was moving in commerce on tax

day, that 14 car loads out of 123 car loads was out of the jurisdiction of the County of Merced, and that the entire cement plant was an export, the Board of Supervisors, instead of canceling the tax altogether, only reduced it by 12%.

VII.

APPELLEES' ARGUMENT THAT THE CASES RELIED UPON BY APPELLANTS DO NOT SUPPORT THE POSITION FOR WHICH APPELLANTS CONTEND IS CONTRARY TO FACT.

In order to support its position, appellees must maintain the consistent attitude that none of the cement plant was loaded on the cars of the railroad carrier. We find this statement again on page 38 of appellees' brief.

Having assumed this state of facts, however erroneously, they then cite *A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66 quoting from page 70: "The overt act of delivering the goods to the carrier marks the point of distinction between this case and *Cornell v. Coyne*, 192 U. S. 418 * * *" The complete answer is that the *Spalding* case supra is directly in point for 14 carloads had been delivered to the railroad carrier by tax day. Further than that, we think that delivery to the export forwarding agent coupled with the other overt acts of dismantling, packaging and loading is almost on all fours with the *Spalding* case, supra.

Clarke and Co. v. Clarke, 3 Woods 408, is declared by appellees (A. B. 39) not to be applicable. This

case involved the delivery of logs to an exporter and they were held to be exempt from taxation. We submit the circumstances are closely analogous.

Appellees take issue with appellants' statement that the view of the California Supreme Court in this case is directly contrary to the recent decision of this Court in *Richfield Oil Corp. v. State Board*, 329 U. S. 69. An analysis of the governing principles as heretofore outlined in our opening brief and this brief reveals the correctness of our view.

Naturally appellees' statement (A. B. 40) that we even entertain a thought that oil in the ground may become an export is erroneous. They do not specify where such a position is taken by us, nor can they do so.

Appellees cite *Puget Sound Stevedoring Company v. Tax Commission*, 302 U. S. 90, 92, 94, and say (A. B. 41) that it has no application here since none of the property taxed had been loaded. The Court's attention is called to this erroneous assumption that not only 14 carloads had left Merced County but that the process of exportation was continuing expeditiously from January 3, 1945, to the time when the cement plant was completely exported.

Appellees dismiss with scant attention the leading cases of *Cayson Petroleum Company v. Vial*, 279 U. S. 95, 105-106; *Railroad Commission v. Worthington*, 225 U. S. 101, 108-111; *Western Oil Refining Company v. Lipscomb*, 244 U. S. 346, 349-350; *Hughes Bros. Timber Co. v. Minnesota*, 272 U. S. 469, 475; *State of*

Texas v. Anderson, Clayton & Co., 92 F. (2d) 104, 107; *Multnomah County v. Dant and Russell, Inc.*, 158 Ore. 350, 354, 75 P. (2d) 986, and *Dahnke Walker Milling Co. v. Bondurant*, 257 U. S. 282, 290, which have heretofore been discussed in our opening brief.

Suffice it to say that so long as appellees seek to disregard the fact that the contract describes the property sold and that neither the contract nor the cement plant is divisible and so long as they maintain that there was no movement on tax day because the 12% reduction in tax removed the 14 carloads which had been loaded and shipped prior to tax day from their knowledge or sight, their approach to the problem will be unrealistic and strained.

CONCLUSION.

We respectfully submit that the transaction involved in the instant case was an exportation of an entire, complete and operative cement plant indivisible in and of itself and sold under a written contract which was entire and indivisible. That upon payment for the cement plant and passage of title to the foreign purchaser, the entire cement plant was delivered to an export forwarding agent for the sole purpose and no other to export the cement plant to Colombia, South America. That everything which was done was necessary and incidental part of and step in its exportation. A tax upon any incident of that export is clearly forbidden by the Federal Con-

stitution, and the judgment of the Court below sustaining the tax as not in contravention of the Constitution, we submit, should be reversed.

All of which is respectfully submitted.

Dated, Oakland, California,
February 4, 1949.

SCOTT D. KELLOGG,
Counsel for Appellants.

(Appendix Follows.)

EXHIBIT "B".

The following items are excepted from the sale covered by the foregoing contract.

1. All automobiles, office furniture, office fixtures, office equipment, and office supplies.

2. All equipment or other property owned by Pacific Gas and Electric Company.

3. The oil storage house and oil pump house and all equipment and structures used in connection therewith, designated as items 6 and 6A on the Plat attached to and herewith made a part of this Exhibit, together with the railroad spur track leading to said oil storage house and designated as Site No. 2 on the aforesaid Plat including but not limited to the following:

Building #6

Walls—

14½ squares corrugated galvanized iron siding

Framing—

19.4 tons structural steel

202 lin ft 3' 6" high 1¼" 2-member welded pipe rail, posts 4' 0" centers

Roof—

57¼ squares corrugated galvanized iron roofing

Building #6/A

Walls—

3 squares corrugated galvanized iron siding

Framing—

1.8 tons structural steel

Roof—

2¼ squares corrugated galvanized iron roofing

4. All railroad tracks on the premises with the sole exception of the spur track leading into the craneway, designated as Siding No. 3 on the attached plat, which is included in the sale up to the point of switching into Siding No. 1; the switching is excluded from the sale.

5. All cement bags, new or used.

6. All grinding bodies, new or used.

7. Pump, motor, and all other equipment and/or structures used in connection with Well No. 2, as shown on the attached Plat; all well casing now in place in either Well No. 2 or Well No. 1, as shown on said Plat; the underground water main running between the water storage tank and the packhouse and cement silos.

8. The packhouse, all cement silos, and all equipment, and/or structures used in connection therewith, and including but not limited to the following items:

All items shown are complete as installed.

South Packhouse

1 12″ x 68′ Screw Conveyor
2 12″ x 73′-6″ Screw Conveyors
1 12″ x 68′ Screw Conveyor
1 16″ x 47′ Cross Screw Conveyor
98 Steel Slide Valve Bin Gates
98 Chutes
1 Reject Screw Conveyor 9″ x 51′

1 Vertical Continuous Chain Bucket Elevator Type 844-K2 Chain with 7″ x 14″ Style A Buckets. Steel Casing 22″ x 60″ x 48′
1 Hummer Vibrating Screen Frame #5359
1 Packer Bin Screw Conveyor 16″ x 72′
1 Bag Conveyor Belt 30″ x 42′ c-c of Pulleys —Steel Frame
3 Steel Packer Bins 125 Bbls. Cap.
3 Bates 3 Valve Packers
7 5″ 2 Way Fuller-Kenyon Cement Line Valves
1 Admix Feeder—Homemade
1 Small Geared Hand Winch
1 50 Ton Howe Truck Scale Platform 10′ x 60′

North Packhouse

2 Screw Conveyor 16″ x 85′
1 Cross Screw Conveyor 16″ x 26′-6″
1 Bag Conveyor Belt 30″ x 40′ c-c of Pulleys
2 Bates 3 Valve Packer
1 Link Belt Vertical Continuous Chain Bucket Elevator Type 844-K2 chain with 8″ x 14″ buckets Steel casing 18″ x 54″ x 50′
1 Packer Bin Screw Conveyor 12″ x 30′
1 Cross Conveyor to Fuller-Kenyon Pump 9″ x 10′
2 Steel Packer Bins—100 Bbls. Cap.
1 Fuller-Kenyon 4″ cement pump
1 3′ x 5′ Vibrating Screen
3 3 Way Fuller-Kenyon Cement Line Valves
4 2 Way Fuller-Kenyon Valves
38 Steel Fuller-Kenyon 14″ Rotary Bin Withdrawal Valves
38 Chutes

Sack Storage & General

1 Singer Sewing Machine
1 Bag Cleaner
8 Rubber Tired Hand Trucks
1 Small Platform Scale—Howe
1 Small Platform Scale—Fairbanks

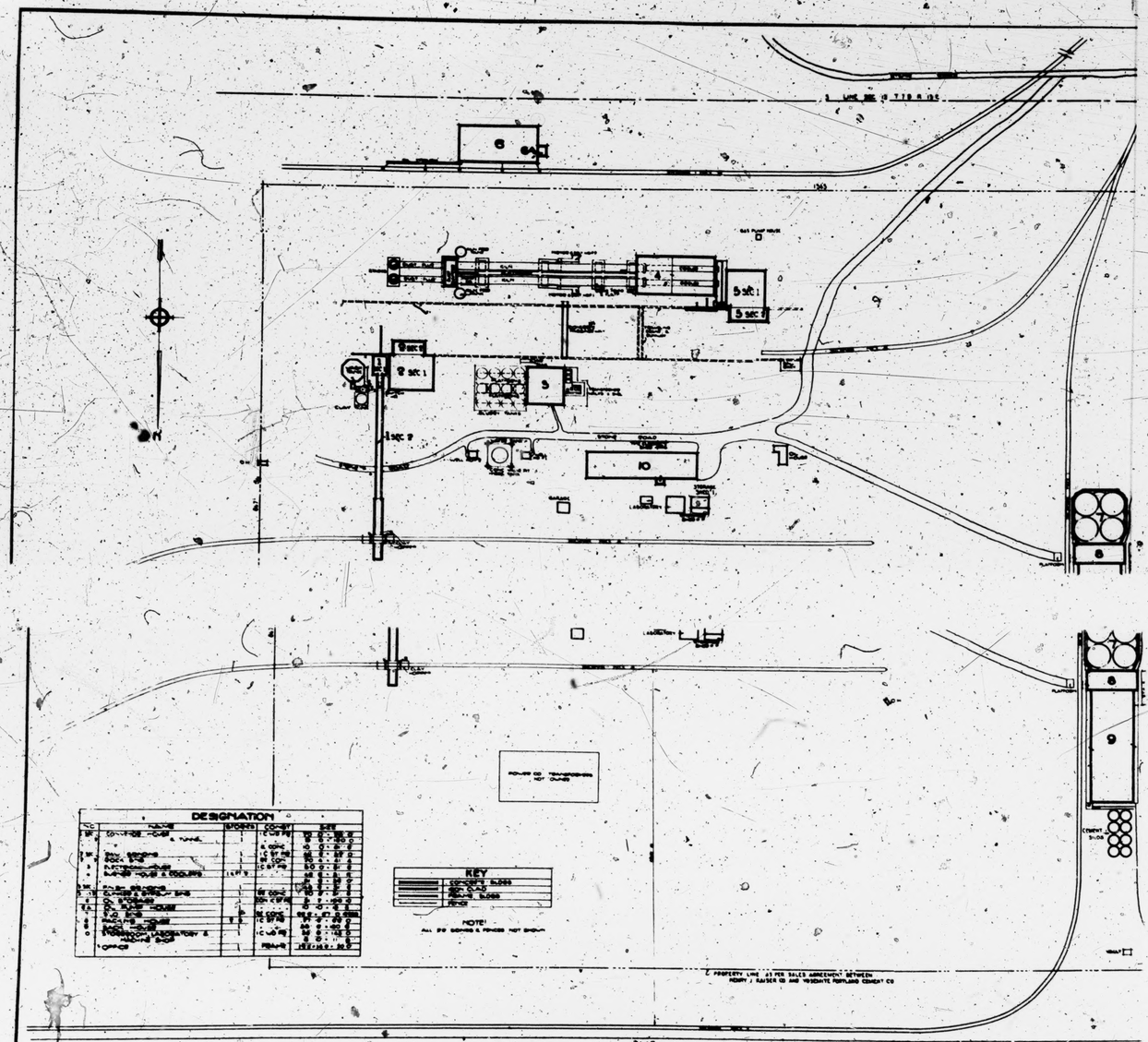
1 Gardner Denver Compressor Model WBH 5014, L.P. 7.5" x 5" H.P. 5.75" x 5", Serial 83962
1 Air Receiver 90 p.s.i. & Air Line 3.5' x 8.0'
1 Bates Bag Tying Machine
800' 5" Cement Line
1 Deepwell Pump
1 Pomona Turbine Pump Serial L 1831

9. All packhouse parts and supplies, including but not limited to the following items:

7 ea. Cones Bates Sack Twine
2 ea. #24-Px8 Grinding Wheels
2 Gross J12 Crescent Rivets
34 ea. #0 Emery Cloth
4 ea. #MUA 1-15/16" Dust Seals
8 ea. #149 Crescent Grip Plates
3 ea. 12" Q Rat Tail Files
9 ea. 8" Tapered Files
2 ea. ½" Street Ells
1 ea. 1 x ½" Reducing Bushing
36 ea. #149 Crescent Long Grip Plates
1 Box #25F Alligator Lacings
100 ea. ⅜" x 1" Machine Bolts
6 ea. ½" x 2½" Machine Bolts
50 ea. ¾" x 5" Machine Bolts
30 ea. ¾" x 5¾" Machine Bolts
18 ea. Cutoff Lever Links #1326C
6 ea. Check Rod Housing #4173C
8 ea. Filling Tube Support #46366
19 ea. Radial Feeder Blades
35 ea. Feed Blade Screws
5 ea. #A 57 Check Rods
3 ea. A62 Cut Off Slides
4 ea. A61 Check Rod Housing Support
2 ea. #6693 Cut Off Levers
8 ea. #9509C Guide Plates
2 ea. #14310 Safety Catches
9 ea. #2918 Bag Clamp Pins
2 ea. #5710 Poise Weight Locking Block

5	ea.	#7999 Cut Off Lever Fulcrum
5	ea.	#24706 Lever & Adj. Screw
4	ea.	#7461 Housing Lever
14	ea.	#14316 Handle Pins
9	ea.	#7492 Housing Liner Screws
14	ea.	#8498 Bag Clamp Release
10	ea.	#4171C Bag Clamp Falk
4	ea.	#13815 Dust Shields
4	ea.	Poise Weight Gag Screws
7	ea.	Safety Latch Brackets
2	ea.	Cut Off Levers #39401
6	ea.	Bates Packer Belts
2	ea.	Bates Packer Springs V-220
8	ea.	Long Wire Tubes 9½"
4	ea.	No. X244 Knives
12	ea.	SAE Cap Screws
10	ea.	Tubes 4½"
4	ea.	Tubes 3"
7	ea.	Bolts No. X261
7	ea.	Cone Wire Tubes X288
13	ea.	Jars No. X258
1	ea.	Jars No. X257
2	ea.	Heads
1	ea.	Core Complete
4	ea.	X305 Valve Tubes
28	ea.	Bates Knife Blades
21	ea.	Scale Beam Weight Cups
1	ea.	#X177 Auto Tying Release Lever
1	ea.	#A48 Bates Packer Bushing
2	ea.	Bates Packer Pinion #4811
1	ea.	Bag Clamp & Latch Bates Packer
1	ea.	#29212 Bag Clamp Cap Extension
6	ea.	#2982 Check Rod Pins
1	ea.	#1431A Bates Discharger Link
1	ea.	Rubber Pad for Bag Clamp
1	ea.	#A 260 Bates Housing Cap Adjust.
1	ea.	#1327C Bates Cut Off Liner Link Bracket
15	ea.	#13414 Check Rod Housing Pins
7	ea.	#3982 Check Rod Housing Pins BP
4	ea.	R.R. Pick Handles

4	ea.	Sledge Hammer Handles
1	ea.	A151 Bates Packer Feeder Gear
2	ea.	1171C Bates Packer Adj. Block
1	ea.	A107 Bates Packer Main Brg. Assbly.
1	ea.	144C Bates Gear End
2	ea.	7444C Bates Jig Shaft Bearing
3	ea.	A95 Bates Packer Housing Comp.
7	ea.	#14 Housing Cap. Bates
14	ea.	Bag Clamp Falks #47510 Bates
2	ea.	2-15/16" Gudgeon Bearings
12	ea.	2-15/16" Hanger Bearings
2	ea.	28 Tooth Sprockets 3" Pitch 3-7/16" Bore
1	ea.	#7460 Stuffing Box Bates Packer
1	ea.	#7460L Stuffing Box Bates Packer
1	ea.	#7460R Stuffing Box Bates Packer
5	ea.	12" Steel Conveyor Flights
73	ea.	600 V 60 amp. Fuse Link #R660
50	Gals.	Algol Compressor Oil
450	Lbs.	Union #5 Cup Grease
9000	ea.	Truck Return Tags
3	ea.	Truck Tongues



PLAT

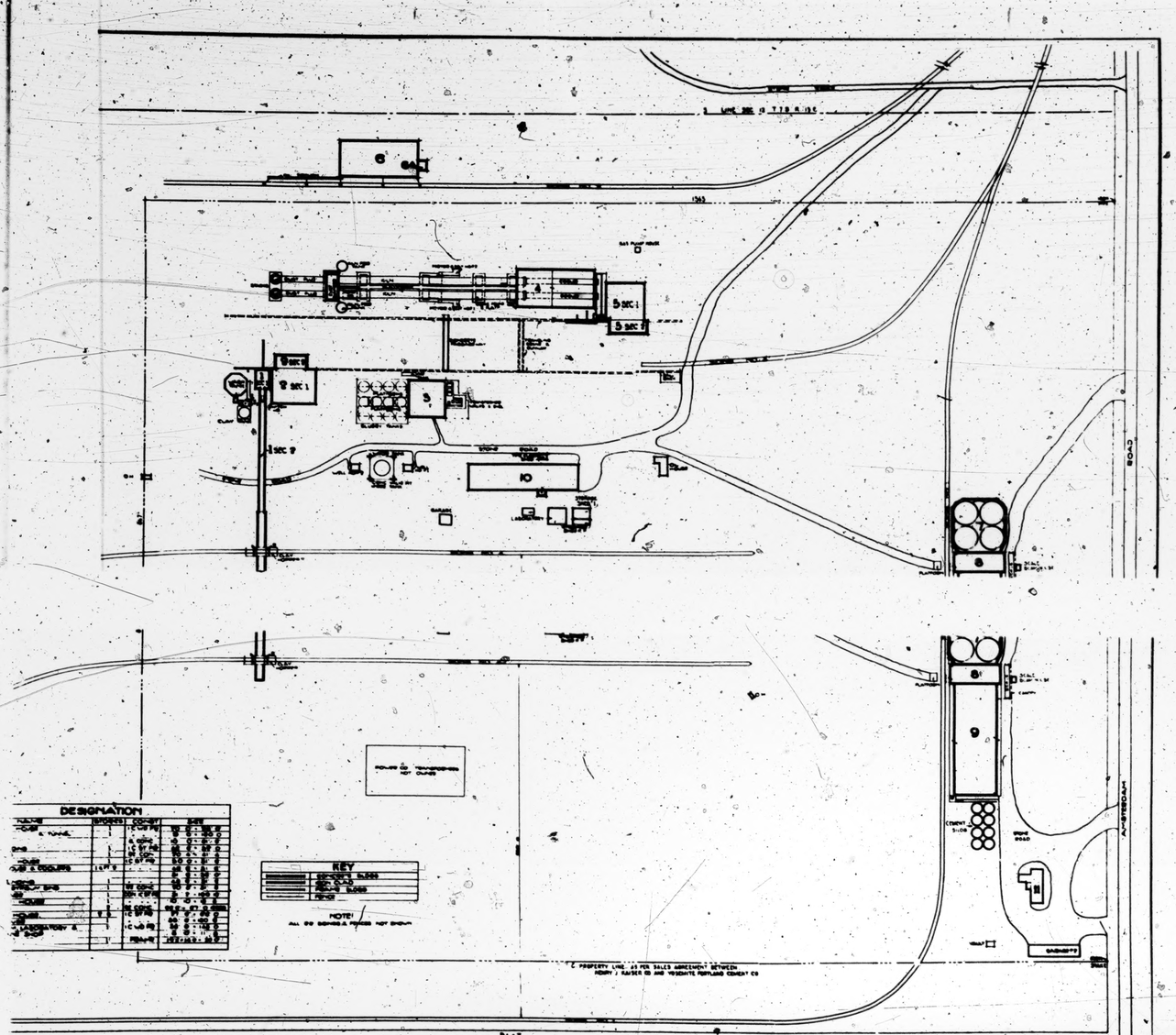
HENRY J. KAISER COMPANY

FORMERLY

YOSEMITE PORTLAND CEMENT CORPORATION

MERCED CALIF.

THE AMERICAN APPRAISAL CO.



PLAT

HENRY J. KAISER COMPANY

FORMERLY

YOSEMITE PORTLAND CEMENT CORPORATION

MERCED CALIF.

WHEREFORE, appellees move the Court to dismiss the appeal in this cause for want of a substantial federal question or, in the alternative, to affirm the judgment of the Supreme Court of California from which this appeal is taken, for the reason that the questions presented are foreclosed by prior decisions of this Court.

Argument in Support of Motion, Statement of the Case, Including the Facts

As part of the statement of facts we wish to point out that while for purposes of convenience the property sold to appellant Empresa Siderurgica, is referred to as the "c ent plant", it included machinery, equipment, removable structures, removable facilities, spare parts, supplies and miscellaneous items. (Tr. 42-45, 54.)* It included such items as gasoline engines, a caterpillar tractor, motors, lathes, wiring supplies, hand tools, twine, furniture and welding equipment and supplies, to mention only a few. (Exhibit 5 of the Agreed Statement of Facts, Tr. 33, 104.) The reference "cement plant" also includes certain machinery, equipment, structures, spare parts and supplies which at one time had been located at a certain quarry at Emory, California, but which, when the contract of sale was entered into, were located at the site of the main plant at Merced. (Tr. 42.)

The estimated status of the property purchased by Empresa Siderurgica, as of tax day, March 5, 1945, was as follows:

12 per cent. had been shipped out of the County; 10 per cent. had been dismantled and crated or prepared for ship-

* As in appellants' Statement as to Jurisdiction, references to the facts stated, unless otherwise noted, will be to the pages of the typewritten Clerk's Transcript on Appeal, upon which the case was reviewed by the Supreme Court of California, and which is included in the transcript certified to this Court.

ment; 34 per cent. had been dismantled but not crated or prepared for shipment; 44 per cent. had not been dismantled (Tr. 113).

The tax assessment as finally adjusted and paid excluded the 12 per cent. which had been shipped out of the county prior to March 5, 1945, and included only the property still located at the plant site in the County of Merced, State of California.

Although the Bigge Drayage Co. was licensed by the Interstate Commerce Commission as a common carrier in interstate or foreign commerce, it was not employed in this case to perform the functions of a common carrier (Tr. 54). Bigge Drayage Co., though it doubtless performed the functions of a common carrier for other persons in other instances, did not perform the functions of a common carrier in this case. It had the equipment to and did perform the functions of a dismantler. Any other dismantling concern could have performed the same functions even though not a common carrier. Bigge Drayage Co. was not employed to and did not transport the property away from the plant site. All of the services performed by it were performed at the plant site. The common carrier which transported the property away from the plant site was the Atchison, Topeka and Santa Fe Railway Co., and none of the property included in the tax assessment as finally adjusted and paid had been delivered to that railroad company by the first Monday in March (March 5, 1945).

The Supreme Court of California recognized in its opinion that exportation may commence by means other than delivery to a common carrier for transportation. It applied the test expressed by this Court in *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, 79, wherein this Court, in referring to *Coe* v. *Errol*, 116 U. S. 517, declared: "* * * What the Court said concerning commerce is what we deem to be the correct principle gov-

erning exports: 'goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey.' P. 527."

The property here assessed had not been shipped, nor entered with a common carrier for transportation to another state, nor started upon such transportation in a continuous route or journey. Consequently it had not ceased to be part of the general mass of property in the State, subject, as such, to its jurisdiction and to taxation in the usual way.

We believe the question here presented has been foreclosed by the decisions of this Court in *Coe* v. *Errol*, 116 U. S. 517, *Cornell* v. *Coyne*, 192 U. S. 418 and *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69.

The trial court, in deciding in favor of the taxpayer, assumed that in *Hughes Bros. Timber Co.* v. *Minnesota*, 272 U. S. 469, only a portion of the logs had been pushed into the stream by tax day and that a portion still remained on the banks of the stream. It construed the decision in the *Hughes* case, therefore, as holding that because some of the logs were moving on tax day, all of them were regarded for purposes of the Commerce Clause as moving in interstate commerce. The record in the *Hughes* case, however, shows that such were not the facts but that on the contrary all of the logs were moving down the stream on their interstate journey on tax day.

We submit that the decisions of this Court relied upon by the California Supreme Court in rendering its decision herein fully support its determination that the taxing statute as here applied does not violate the Import-Export Clause.

LIBRARY
SUPREME COURT U.S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 327

EMPRESA SIDERURGICA, S. A., a CORPORATION OF COLOMBIA, SOUTH AMERICA, AND VANDERBURGH & CO., INC., A CALIFORNIA CORPORATION,

Appellants,

vs.

COUNTY OF MERCED, A MUNICIPAL CORPORATION; J. EMMETT McNAMARA, ASSESSOR OF THE COUNTY OF MERCED, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

FRED N. HOWSER,
Attorney General of the State of California;
JAMES E. SABINE,
Deputy Attorney General of the State of California;
GREGORY P. MAUSHART,
District Attorney of the County of Merced,
Counsel for Appellees.

Conclusion

Inasmuch as appellants' contentions concerning alleged violation of the Import-Export Clause have been foreclosed by prior decisions of this Court, we respectfully submit that this appeal should be dismissed or in the alternative that the judgment of the Supreme Court of California should be affirmed.

Respectfully submitted,

FRED N. HOWSER,
Attorney General of the State of California;
JAMES E. SABINE,
Deputy Attorney General of the State of California;
GREGORY P. MAUSHART,
District Attorney of the County of Merced,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 327

EMPRESA SIDERURGICA, S. A., a CORPORATION OF COLOMBIA, SOUTH AMERICA, AND VANDERBURGH & CO., INC., A CALIFORNIA CORPORATION,

Appellants,

vs.

COUNTY OF MERCED, A MUNICIPAL CORPORATION; J. EMMETT McNAMARA, ASSESSOR OF THE COUNTY OF MERCED, ET AL.,

Appellees

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

MAY IT PLEASE THE COURT:

Appellees in the above entitled cause move the Court to dismiss this appeal or to affirm the judgment below for the following reason:

There is no substantial federal question presented as a basis of jurisdiction in this Court, because the questions presented have been foreclosed by previous decisions of this Court.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 327 327

EMPRESA SIDERURGICA, S. A., a Corporation of Colombia, South America, and VANDERBURGH & Co., INC., a California Corporation,

Appellants,

vs.

COUNTY OF MERCED, a Municipal Corporation; J. EMMETT McNAMARA, Assessor of the County of Merced, et al.,

Appellees.

Appeal from the Supreme Court of the State of California.

BRIEF FOR APPELLEES.

FRED N. HOWSER,
Attorney General of the State of California,
JAMES E. SABINE,
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In the Supreme Court
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No. 327

EMPRESA SIDERURGICA, S. A., a Corporation of Colombia, South America, and VANDERBURGH & CO., INC., a California Corporation,

Appellants,

vs.

COUNTY OF MERCED, a Municipal Corporation; J. EMMETT MCNAMARA, Assessor of the County of Merced, et al.,

Appellees.

Appeal from the Supreme Court of the State of California.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This is an action to obtain a refund of property taxes paid to the County of Merced, a political subdi-

vision of the State of California. The basic controversy is whether the property here involved, on tax day, March 5, 1945, was exempt from tax by reason of the provisions of Article I, section 10, Clause 2 of the Constitution of the United States, prohibiting the states from laying imposts on exports.

The action was tried upon an Agreed Statement of Facts. (R. 17.) This Agreed Statement sets forth that prior to November 11, 1944, negotiations were entered into between Empresa Siderurgica, S. A., a corporation organized under the laws of Colombia, South America, with its principal place of business at Medellin, Colombia, South America, and Henry J. Kaiser Company, a Nevada corporation with its principal place of business in Oakland, California, for the purchase of what is described as the Yosemite Portland Cement Plant, its machinery and equipment, located near the City of Merced, in the County of Merced, State of California. (R. 18.)

Thereafter, on November 11, 1944, Henry J. Kaiser Company entered into a written contract for the sale to Empresa Siderurgica, S. A., of that certain property described as Yosemite Portland Cement Plant. (R. 18.)

While for purposes of convenience, the property sold to appellant, Empresa Siderurgica, was referred to in the contract between seller and purchaser as "the cement plant", and at times is so referred to in this brief, we take issue with the statement appearing at page 7 and elsewhere in appellants'

opening brief, that *an* article was sold to Empresa. Appellants assert that what was sold was one indivisible article. The record shows, however, that although the phrase "cement plant" was used as a convenient method of reference, the property sold consisted of numerous items. It included machinery, equipment, removable structures, removable facilities, spare parts, supplies and miscellaneous items. (R. 23-25, 30-31.) It included such items as gasoline engines, a caterpillar tractor, motors, lathes, wiring supplies, hand tools, twine, furniture and welding equipment and supplies, to mention only a few. (Exhibit 5 of the Agreed Statement of Facts, R. 63-76.) The reference "cement plant" also includes certain machinery, equipment, structures, spare parts and supplies which at one time had been located at a certain quarry at Emory, California, but which when the contract of sale was entered into were located at the site of the main plant at Merced. (R. 23.)

Moreover, certain specific items of machinery, equipment, structures, facilities, parts, supplies and other items were specifically excluded from "the cement plant" sold to Empresa. (R. 25.) This is apparent from Article II C of the Contract of Sale (R. 25) which provided that

> "Certain specific items of machinery, equipment, structures, facilities, parts, supplies, and/or other items as listed in 'Exhibit B' attached hereto and by this reference made a part hereof, are specifically excluded from the cement plant to be sold to Purchaser under this Agreement, and

> title to all of said items in 'Exhibit B' shall remain in Seller or third party".

It is apparent from the foregoing that we disagree with appellants' assertion at page 29 of their opening brief that this case comes before this Court by stipulation that an entire, complete and operative cement plant is the article which was purchased. The best and complete answer to this assertion is the record in this case.

While the statement is made at page 28 of appellants' opening brief that it was warranted in the contract of sale that nothing had been removed between July 1, 1944, and the date of the contract of sale "which would make it inoperative", we wish to point out that the actual wording of the contract (R. 25) was that

> "* * * Seller warrants that it has not thereafter sold or removed any equipment or property from said cement plant except that listed in 'Exhibit B' * * *".

The content of "Exhibit B" is explained by Article II C of the contract (R. 25) above referred to.

The record is silent on the assertion made, at page 10 of appellants' opening brief, that "Exhibit B" contained items not necessary for the operation of the cement plant. Exception of these items further demonstrates that the property sold was not *an* article.

The statement at page 28 of appellants' opening brief that "the exportation of the cement plant was the only act to be done upon the consummation of

the sale" is not correct for the record clearly shows that the property was sold in an undismantled condition. The substantial nature of the work of dismantling and packing required to be done is indicated by the fact that the amount of compensation agreed to be paid to Bigge Drayage Co. for performing such work was $120,000. (R. 38.)

On December 2, 1944, Vanderburgh & Co., Inc., was designated as forwarding agent in place of the forwarding agent originally designated in the contract, and Vanderburgh & Co., Inc., entered into a contract with Bigge Drayage Co. to dismantle the cement plant, disassemble the equipment, package the same for shipment and deliver the property to the Atchison, Topeka and Santa Fe Railway Company at the plant site for transportation by rail to the port of embarkation. (R. 18-19, 30.)

While Bigge Drayage Co. is referred to throughout appellants' opening brief as the "contractor-common carrier", it may help to thin the legal thicket if we emphasize at this point that Bigge Drayage Co. was not employed to and did not perform the functions of a common carrier in this case. Here it merely performed the functions of a dismantler. All of its activities in so far as the present problem is concerned were performed at the plant site. It did not carry any of the property over the public highways. It merely dismantled and packaged the property at the plant site, from whence the property was carried by the Atchison, Topeka and Santa Fe Railway Company, whose tracks included a siding at the plant site.

The contract between Henry J. Kaiser Company and Empresa Siderurgica provided that title to the property, with the exception of the items set out in "Exhibit B" of the contract, should be transferred to and vest in the purchaser upon the occurrence of two conditions: (1) the issuance by the appropriate officials of the export permit or license required by the contract, and (2) the establishment of a letter of credit in accordance with the terms of the contract. (R. 19-20.)

On December 15, 1944, the Foreign Economic Administration in Washington, D. C., issued an export license to the Henry J. Kaiser Company and on January 3, 1945, a letter of credit covering the unpaid balance of the purchase price of the property was deposited with a bank in favor of the Henry J. Kaiser Company. (R. 20.)

On January 3, 1945, Vanderburgh & Co., Inc., and Bigge Drayage Co. entered into possession of the plant and immediately began to dismantle and disassemble the plant and package it on the site, in preparation for shipment abroad to Colombia, South America. (R. 21.)

On March 5, 1945, the County Assessor of Merced County assessed personal property taxes against the cement plant. (R. 21.) The estimated status of the plant as of tax day, March 5, 1945, was as follows:

12% had been shipped out of the county;

10% had been dismantled and crated or packaged for shipment;

34% had been dismantled but not crated or packaged for shipment;

44% had not been dismantled. (R. 22, 83-84.)

The assessment as finally adjusted and paid excluded the 12% which had been shipped out of the county prior to March 5, 1945. (R. 22.)

On January 18, 1946, the plant had been packaged and shipped out of the County of Merced and on January 29, 1946, the plant had been completely shipped out of California and the United States. (R. 22.)

This action subsequently was brought by Empresa Siderurgica, S. A., and Vanderburgh and Co., Inc., to recover the amount of taxes paid under protest. The trial court rendered judgment in favor of the plaintiffs. (R. 96.) On appeal the Supreme Court of California reversed the judgment of the trial court and held in favor of the defendants. (R. 104.)

SUMMARY OF ARGUMENT

In *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69, 79, this Court, quoting from *Coe v. Errol*, 116 U.S. 517, 527, stated that the correct principle governing exports is that

> "goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to an-

other State, or have been started upon such transportation in a continuous route or journey."

None of the property here assessed had been shipped, or entered with a common carrier for transportation to a foreign destination or started upon such transportation in a continuous route or journey. On tax day, March 5, 1945, all of the property taxed still was at the site where it was located when it was purchased, and approximately half of it had not even been dismantled. Most of that which was dismantled had not been packaged and none of the property taxed had been loaded on the cars of the railroad which was to carry it away from the plant site.

Intent to export property does not confer upon it an exempt status, nor does the existence of a contract of sale of property to be exported. *Cornell v. Coyne,* 192 U.S. 418. See *Coe v. Errol,* 116 U.S. 517, and *Heisler v. Thomas Colliery Co.,* 260 U.S. 245. *Cornell v. Coyne,* supra, involved a contract which required the seller to ship its entire output of cheese during a specified period to a foreign destination. This Court said Article I, Section 9, Clause 5 of the Constitution did not prevent application of the federal tax there involved. ". . . The exemption attaches to the export and not to the article before its exportation. . . ." (p. 427.)

In this case, the firm employed to dismantle the property, Bigge Drayage Co., also held a certificate from the Interstate Commerce Commission permitting it to operate as a common carrier. However, Bigge

was not employed to and did not perform the functions of a common carrier here. It was employed to dismantle the property and prepare it for shipment. It was not employed to transport the property away from the plant site. All of the services performed by it were performed on the plant site. In view of the fact that the property had to be dismantled and packaged before it could be transported away from the plant site and in view of the fact that Bigge was not employed to perform and did not perform the functions of a common carrier in this case, but only the functions of a dismantler, the property, while being dismantled by Bigge, was not in a position equivalent to property which has been delivered to a common carrier for transportation.

Employment of a forwarding agent by the purchaser did not confer an exempt status on the property taxed. Property which has to be dismantled and prepared for shipment is not an export whether arrangements for dismantling and preparation for shipment are made directly by the purchaser or through a forwarding agent. The substantial nature of the dismantling operations is indicated by the compensation of $120,000 agreed to be paid to the dismantler. (R. 38.)

The facts of this case are materially different from those in *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66, and in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69. In the *Spalding* case the goods had been delivered on board a vessel of a common carrier and this Court said that ". . . The overt

act of delivering the goods to the carrier marks the point of distinction between this case and *Coryell v. Coyne,* 192 U.S. 418. . . ." In the *Richfield* case, the oil was delivered into the hold of the purchaser's ship and this Court said ". . . That delivery marked the commencement of the movement of the oil abroad. . . ." The facts of the instant case present a sharp contrast from the *Spalding* and *Richfield* cases, for here approximately half of the property taxed had not even been dismantled, most of that which had been dismantled had not been packaged, none of the property taxed had been loaded on the cars of the railroad which was to carry it away from the plant site, all of the property taxed still was at the site where it was located when it was purchased, and some of it remained in the county for nearly another year, receiving the police protection, fire protection and other services and benefits afforded by the County of Merced and the State of California.

The "cement plant" here involved included numerous items, consisting mainly of items of machinery and equipment. Appellants' argument, that the property was one indivisible article and that when a portion of it had been shipped all thereby acquired an export status, disregards the physical facts and the applicable legal principles.

The property which had not been dismantled clearly had not commenced its final journey out of the state, but the same also is true of that which had been dismantled for such movement as was involved in dismantling and packaging the property was preparatory

or preliminary in nature and was not the movement which launched the property on its final journey out of the state. *Cornell v. Coyne*, 192 U.S. 418, *Coe v. Errol*, 116 U.S. 517.

To grant exemption here would not be consistent with the prior decisions of this Court or the purpose of the Import-Export Clause. It would create a broad area of tax exemption and afford opportunities for tax avoidance not contemplated in the framing of the Import-Export Clause.

Under the test laid down by this Court in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 79, none of the property here taxed was exempt as an export, for none had been "shipped, or entered with a common carrier for transportation to another State, or . . . started upon such transportation in a continuous route or journey." None of the property taxed, therefore, had ceased to be part of the general mass of property in the State, "subject, as such to its jurisdiction, and to taxation in the usual way. . . ." (P. 79.)

ARGUMENT.

I. NONE OF THE PROPERTY TAXED HAD AN EXPORT STATUS ON TAX DAY.

The applicable principle in determining when property ceases to be part of the general mass of property in the state and acquires an exempt status is stated in *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69, 79, wherein this Court in referring to *Coe v. Errol*, 116 U.S. 517, declared:

"* * * What the Court said concerning commerce is what we deem to be the correct principle governing exports: 'goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey.'"

None of the property here taxed had been shipped, or entered with a common carrier for transportation to a foreign destination or started upon such transportation in a continuous route or journey. All of the property taxed still was on tax day, March 5, 1945, at the site where it was located when it was purchased. Some 44% of the property sold to appellant Empresa Siderurgica (approximately half of the property taxed), had not even been dismantled, most of that which had been dismantled had not been packaged, and none of the property taxed had been loaded on the railroad cars.

This Court in *Coe v. Errol,* 116 U.S. 517, draws a clear distinction between preparation for shipment and actual commencement of the journey. In *Coe v. Errol* certain logs were cut down in New Hampshire and hauled to the Town of Errol in that State where they were on tax day, resting on the banks of a stream down which they were to be floated to the State of Maine, there to be manufactured and sold. This Court upheld the imposition of the tax upon the basis that

the interstate movement of the logs had not commenced by the time the tax was imposed.

The instant case presents an even stronger basis for sustaining the validity of the tax than was present in *Coe v. Errol*. Here a portion of the property still was standing in an undismantled condition. It had not even been "cut down". In *Coe v. Errol* even though the logs had been cut down and hauled to the Town of Errol it was held that their exportation had not commenced. It was so held even though the logs were acquired by a citizen of another state for use in that state.

This Court in *Coe v. Errol* in the course of its opinion, at page 524, pointed out that the products of a state though intended for exportation to another state and partially prepared for that purpose by being deposited at a place or port of shipment within the state are liable to be taxed like other property within the state. This Court in effect held that the logs cut in New Hampshire were not actually started in the course of transportation, that they had not commenced their final movement for transportation from the state of their origin to that of their destination.

This Court stated that certainly so long as the products, such as wheat and corn, are on the lands which produced them, they are part of the general property of the state. They continue to be until they have entered upon their final journey for leaving the state. At page 528 of the opinion it is stated:

> "But this movement does not begin until the articles have been shipped or started for trans-

portation from the one State to the other. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary ~~work~~ performed for the purpose of putting the property in a *state of preparation and readiness for transportation.* * * *" (Emphasis added.)

In *Cornell v. Coyne*, 192 U. S. 418, this Court held that a federal manufacturing tax on filled cheese did not violate the provision of the Constitution forbidding the imposition by the Federal Government of taxes on "articles exported from any state". (Article I, section 9, Clause 5.) *This Court so held even though the record in that case shows that the cheese was manufactured under contracts providing for the manufacture and sale of cheese exclusively for export during the period there involved.* It said that the goods were not in the process of exportation at the time of the imposition of the tax, but were merely in the course of preparation for export. This Court rejected the argument that goods are exempt from tax merely because they are manufactured with the intention and purpose of exporting them and they are ultimately exported.

The plaintiffs in *Cornell v. Coyne* actually exported over a million and a half pounds of filled cheese, their entire output during the period involved, yet this Court found no constitutional infirmity in the tax there involved. This Court said that articles exported are not relieved from the prior ordinary burdens of

taxation, that the exemption attaches to the export and not to the article before its exportation, that the prohibition of both export clauses of the Constitution has reference to the imposition of duties on goods by reason of or because of their exportation or intended exportation or while they are being exported.

In the course of its opinion this Court said at page 427:

> "* * * A farmer may raise cattle for the purpose of exportation, and in fact export them. Can it be that he is entitled to a return of all property taxes which have been cast upon those cattle? A true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation * * *"

See also *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 259-261, upholding, against interstate commerce clause objections, a tax upon coal ready for shipment, including that intended for shipment out of the state, in which this Court said that:

> "* * * If the possibility, or, indeed, certainty of exportation of a product or article from a State determines it to be in interstate commerce before the commencement of its movement from the State, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. * * *

"* * * In *Coe v. Errol*, 116 U.S. 517, the precise contention here made was passed upon and rejected. It involved the taxing power of a State, and the property subject to it (timber cut in its forests) was intended for exportation and had progressed nearer to exportation than the coal in the present case.

"The question in the case was said to be 'whether the products of a State (in this case timber cut in its forests) are liable to be taxed like other property within the State, though intended for exportation to another State, and partially prepared for that purpose by being *deposited at a place of shipment, such products being owned by persons residing in another State.*' And again, 'Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation?' In answer to the questions, the point of time when goods cease to be under the power of the State and come under the protection of the Constitution was considered. To express it, as the Court did, 'there must be a point of time when they (goods) cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination.'" (Emphasis added.)

In an effort to distinguish the case of *Cornell v. Coyne*, 192 U.S. 418, appellants, at page 41 of their opening brief, assert that although the filled cheese

was manufactured for export, this Court held that the manufacturing process was not commerce. At this juncture, it may be observed that dismantling property involves preparatory activities in advance of shipment as does manufacturing. The substantial nature of the dismantling activities here is indicated by the compensation of $120,000 provided for in the dismantling contract. (R. 38.)

Appellants argue that the filled cheese was not filled cheese until it was manufactured and that it could not move in commerce as filled cheese until it had become filled cheese. Similarly here the property could not move in commerce until dismantled and prepared for shipment. Moreover, in *Carnell v. Coyne*, supra, the cheese had been manufactured and placed in packages prior to the time the revenue stamps were applied for. This was in accordance with the Commissioner's Regulations under the applicable statute.

The record does not justify the statement made by appellants at page 42 of their opening brief that nothing was required in connection with the property here involved except to export it. If this were true, why were contracts made for dismantling the property and preparing it for shipment? It hardly is accurate to state that nothing is required with respect to undismantled property except to export it. And to argue, as appellants do at page 42 of their brief, that the Constitution does not require a person to do an impossible act to qualify for the benefits granted under the Constitution, is in effect to argue that property should be granted the immunity of an export before it

has become an export. Such contention is directly contrary to the principles announced by this Court in *Cornell v. Coyne,* and other leading decisions.

In these cases such as *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69, *Cornell v. Coyne,* 192 U.S. 418, and *Coe v. Errol,* 116 U.S. 517, involving the question whether the interstate or foreign journey has commenced, this Court draws a distinction between preparation for shipment and the actual commencement of the movement of the goods in the course of the interstate or foreign journey. In view of these decisions we think it is apparent from the Agreed Statement of Facts that none of the property taxed was in export on tax day. Indeed, the Agreed Statement specifically sets forth that on January 3, 1945, Vanderburgh & Co., Inc. and Bigge Drayage Co. entered into possession of the plant and immediately began to dismantle and disassemble the plant and package it on the site *in preparation for* shipment abroad to Colombia, South America. (R. 21.) The contract between Vanderburgh & Co., Inc. and Bigge Drayage Co. was, as its title indicated, a "Contract for Dismantling and Preparation for Shipment of Yosemite-Portland Cement Plant". (R. 30.)

The property taxed consisted of 44% of the property sold which had not been dismantled, 34% which was dismantled but not crated or prepared for shipment and 10% which was dismantled and crated or prepared for shipment. There was excluded from the assessment the 12% which had been shipped prior to tax day. All of the property taxed was still at the plant site.

None had been loaded on railroad cars or even placed in the possession of the Atchison, Topeka and Santa Fe Railway Company which was to carry the property from the plant site to the port of shipment. It seems evident, therefore, that none of the property taxed had commenced the foreign journey. Indeed, some of it remained in the County for nearly another year and received the police protection, fire protection and other benefits accorded by the County and the State.

Under the applicable decisions of this Court the property taxed had not at the time of the imposition of the tax acquired an export status. As stated in *Cornell v. Coyne*, 192 U.S. 418, 427, the constitutional exemption "does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export, and not to the article before its exportation. * * *"

Appellants suggest at pages 27 and 28 of their opening brief that affirmance of the decision of the California Supreme Court would amount to holding that seaboard states could tax goods "sent from other states" so long as they are not loaded on a common carrier. The decision of the California Supreme Court does not in the slightest degree constitute a holding that goods sent from other states may be taxed by the seaboard states. No such problem even was involved. The facts plainly show that this is not a case involving taxation of goods "sent from other states." The problem here presented is whether property,

located at the time of purchase in the state in which the tax is imposed, which property has been part of the general mass of property in the state subject to taxation over a considerable period of time, a substantial part of which, on tax day, still is standing undismantled, and none of which has been moved from the site where it was located at the time of purchase, has ceased to be part of the general mass of property in the state, subject to taxation in the usual way. The California Supreme Court answered the question by applying the test approved by this Court in *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69, 79.

It is not accurate to state, as appellants have done at page 40 of their opening brief, that the California Supreme Court held that the work of dismantling, packaging, *and loading on the cars of the railroad* by the dismantler was not the equivalent to delivery to a common carrier for transportation, for none of the property taxed had been loaded on the cars of the railroad and much of it still was undismantled.

The statements at pages 6, 26, 36 and elsewhere in appellants' opening brief concerning the decision of the Supreme Court of California, are inadequate for they convey the impression that the Court held that the only way property may become an export is by delivery to a common carrier. Such was not the extent of the holding.

Despite appellants' assertions to the contrary, the Supreme Court of California recognized in its opin

ion that exportation may commence by means other than delivery to a common carrier for transportation. It applied the test expressed by this Court in *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69, 79, that

> "goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey."

It was of the view that, judged by this standard, the property included in the assessment had not acquired an export status entitling it to exemption from property taxation.

Appellants seek to have this Court hold that property which had not been delivered to a common carrier for transportation, which had not been moved from the site where it was located when it was purchased, and a substantial part of which still was standing in an undismantled condition, nevertheless was in export on tax day. Appellants have not cited and we are not aware of any decision of this Court which would justify such a result.

II. AN INTENT TO EXPORT PROPERTY DOES NOT CONFER UPON THE PROPERTY AN EXEMPT STATUS AND NEITHER DOES THE EXISTENCE OF A CONTRACT OF SALE OF PROPERTY TO BE EXPORTED.

This Court has made it clear in its prior decisions that the intent to export property is not sufficient to confer upon it an exempt status and the same is true even if the intent has ripened into a contract of sale for exportation.

Cases such as *Cornell v. Coyne*, 192 U.S. 418, and *Coe v. Errol*, 116 U.S. 517, 524, clearly demonstrate that intent to export is not sufficient to confer exemption, even though the property ultimately is exported. In *Coe v. Errol* this Court said:

> ". . . It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many States there would be nothing but the lands and real estate to bear the taxes. Some of the Western States produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State. . . ." (pp. 527-528).

And it has been held that even though there is a contract requiring the exportation of all property manufactured during a specified period of time "The exemption attaches to the export, and not to the arti-

cle before its exportation. . . ." *Cornell v. Coyne*, 192 U.S. 418. See also *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 259-261; *Coe v. Errol*, 116 U.S. 517, 524.

Appellants, at page 57 of their opening brief, state that it was "intended" that the property should be placed on the cars of the railroad, but prior decisions of this Court have made it clear that the mere intention to place property on a carrier is not sufficient to give it an export status. Neither is it sufficient that the "object" of the parties to the transaction is the exportation of property to a foreign destination, despite the contrary suggestion at page 59, of appellants' opening brief.

In the opinion of the trial court in this case, referred to at page 52 of appellants' opening brief, the statement is made that there was no reasonable probability that the proposed export would not be concluded. However, it was equally true in *Cornell v. Coyne*, 192 U.S. 418, that there was no reasonable probability that the proposed export there would not be concluded.

It was argued in *Cornell v. Coyne* that the exportation or non-exportation of the filled cheese did not rest merely in the intention of the sellers but that they were absolutely bound under their contracts to export it, that the terms of their agreement would not permit them to change their minds. Nevertheless this Court held that the property had not acquired an export status.

Appellants argue that "certainty of the foreign destination" is sufficient to confer immunity from taxa-

tion. Brief contemplation of this argument, we believe, will demonstrate its error. There can be certainty of the foreign destination, for example, of property that takes years to produce, process and prepare for shipment. Suppose a seller in this country enters into a contract with a foreign purchaser to furnish a giant telescope. Would the telescope be an export while being ground and tested even though made under contract to particular specifications for use in a foreign country? An affirmative answer would mean that property which for years receives the services and protection of the state of its origin, does so free from any obligation to contribute to the costs of government. We submit that no such result was contemplated in the framing of the Import-Export Clause.

In the conclusion to their brief appellants assert that both parties to the transaction had but one thing in mind, the exportation of the property to South America. The same was equally true in *Cornell v. Coyne*, 192 U.S. 418, where exemption from the taxation was denied.

III. EMPLOYMENT OF A DISMANTLER AND A FORWARDING AGENT DID NOT CONFER AN EXEMPT STATUS UPON THE PROPERTY TAXED.

(a) Employment of a common carrier to dismantle but not transport property does not confer upon it an exempt status.

Appellants contend that all of the property assessed, including that which had not been dismantled, had acquired an export status because a common car-

rier was employed to dismantle but not transport the property. There does not appear to be any legal support for this contention.

Appellants assert that Bigge Drayage Co. was licensed by the Interstate Commerce Commission as a common carrier in interstate or foreign commerce and that when Bigge entered into possession of the cement plant on January 3, 1945, it was the same as delivery to a railroad or boat.

In making this contention appellants overlook several vital features of the case. One was the necessity of dismantling and preparation before shipment could occur. That was the purpose for which Bigge was employed, to dismantle and prepare the property for shipment. None of the property assessed was in the equivalent position of property which has been delivered to a railroad or boat.

Appellants' contention also overlooks the fact, referred to in our statement of the case, that Bigge was not employed in this case to perform the functions of a common carrier. Bigge Drayage Co., though it doubtless performed the functions of a common carrier for other persons in other instances, was not employed to and did not perform the functions of a common carrier in this case. It had the equipment to and did perform the functions of a dismantler. Any other dismantling concern could have performed the same functions, even though not a common carrier. Bigge Drayage Co. was not employed to and did not transport the property away from the plant site. (R. 21,

30, 40.) All of the services performed by it were performed on the plant site. The common carrier which transported the property away from the plant site was the Atchison, Topeka and Santa Fe Railway Company and none of the property assessed had been delivered to that railroad company by tax day, March 5, 1945. None of the property assessed, by March 5, 1945, had been *"delivered to a common carrier for transportation"* within the meaning of the opinions of this Court. (*Coe v. Errol,* 116 U.S. 517, 527; *Richfield Oil Corporation v. State Board of Equalization,* 329 U.S. 69, 79.) This Court in referring to delivery to a common carrier obviously meant delivery to one who *in the particular situation involved* was performing the functions of a common carrier. This Court, moreover, in referring to delivery to a common carrier as constituting the commencement of an interstate or foreign movement has been careful to add the words "for transportation" and we believe there is no justification whatever for inferring from the language used that it was intended to apply to a case in which the company involved does not perform the functions of a common carrier but merely dismantles and prepares property for shipment.

We respectfully submit that even if an additional element had been present here, namely, that after Bigge had dismantled and packed the property for transportation it also was to transport the property as a common carrier, nevertheless the applicable authorities indicate that even under those circumstances the exportation would not be deemed to have

commenced by tax day, March 5, 1943. Suppose, for example, that in the case of *Cornell v. Coyne*, 192 U.S. 418, the manufacturer of filled cheese also had been a common carrier. Can there be any doubt that the cheese would not have acquired an export status prior to the commencement of its transportation abroad?

See also *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 259-261; *Coe v. Errol*, 116 U.S. 517, 524.

These and other decisions of this Court clearly demonstrate that dismantling and preparation for export are not sufficient to give property the status of exports. Here none of the property had advanced beyond the stage of preparation for shipment, so even if Bigge had been employed also to transport the property, which it was not, it seems evident that the tax still would have been valid.

Efforts of appellants at pages 47 and 48 of their opening brief to liken the relation of Bigge to that of a common carrier for transportation are not convincing. The argument is worded as if all of the property taxed had been delivered by Bigge to the railroad; whereas the record clearly shows that none of the property taxed had been delivered to the railroad and much of it had not been dismantled. *Coe v. Errol*, 116 U.S. 517, presents a much stronger case for an exemption from tax but this Court held that the preparatory movements there involved did not give the property immunity from state taxation.

The statement at page 44 of appellants' opening brief that at the time the contract was made with

Bigge it was considered that a possibility might occur in which an allocation of shipping space had been made and that no railroad cars would be available to transport it in time to meet the boat, is not supported by the record. We find nothing in the contract with Bigge, or elsewhere in the record, to support this statement even if it had any legal significance, which we do not believe it has.

(b) Employment of a forwarding agent does not confer an exempt status on property which has to be dismantled and prepared for shipment.

Employment of a forwarding agent by the purchaser did not confer an exempt status on the property taxed. Property which has to be dismantled and prepared for shipment is not an export whether arrangements for the dismantling and preparation for shipment are made directly by the purchaser or through a forwarding agent. In *Coe v. Errol*, 116 U.S. 517, 527, the out-of-state owner was in possession of the logs and making arrangements for their transit out of the state but this Court nevertheless held that the journey had not yet commenced. In the instant case work of dismantling and preparation for shipment remained to be done prior to the transportation of such property, for which compensation was agreed to be paid in the amount of $120,000. (R. 38.) Here the forwarding agent, Vanderburgh & Co., Inc., arranged with Bigge Drayage Co. to dismantle and prepare the property for shipment, but this does not mean that the property thereupon acquired an export status.

At page 59 of their opening brief appellants again urge the argument that employment of the forwarding agent was sufficient to give all of the property an export status even before it was dismantled. This would mean that property would be an export even though work had to be done on it before it could be shipped. Surely if a forwarding agent was also a manufacturer of property the property would not be regarded as an export while it was being manufactured even though it was being manufactured by a forwarding agent. In other words, the mere employment of a forwarding agent in the transaction does not give the magic touch of exemption.

Appellants ask this Court to go far beyond the boundaries of any decision which it has rendered on the subject. The applicable decisions of this Court, we think, clearly indicate that the property here involved, a substantial part of which was still standing undismantled in Merced County, had not acquired the status of an export at the time the tax was assessed.

IV. SHIPMENT PRIOR TO TAX DAY OF A PORTION OF THE PROPERTY SOLD TO A FOREIGN PURCHASER DID NOT CONFER EXEMPTION UPON THE PROPERTY STILL REMAINING IN THE COUNTY ON TAX DAY.

Appellants argue that because part of the property which was purchased by Empresa had been shipped out of the State by tax day, all of the property was exempt from tax, including that still standing in the County in an undismantled condition.

Appellants argue that what they purchased was an entire operating cement plant and that when any part of the property purchased had been shipped it all should be regarded as moving in export, even that which still was standing in an undismantled condition. We are not aware of any decision of this Court which supports the position contended for by appellants.

Moreover, as mentioned in our Statement of the Case, while for purposes of convenience the property sold was referred to in the contracts as the "cement plant", it was not the entire indivisible unit which appellants seek to make it appear. In the first place all of the property at the plant site was not sold to Empresa. Certain of the machinery, equipment, structures, facilities, parts, supplies and other items were reserved from the contract of sale. (R. 25.) The property sold to Empresa included machinery, equipment, removable structures, removable facilities, spare parts, supplies and miscellaneous items. (R. 23-25, 30-31.) It included such items as gasoline engines, a cate pillar tractor, motors, lathes, wiring supplies, hand tools, twine, furniture and welding equipment and supplies, to mention only a few. (Exhibit 5 of the Agreed Statement of Facts, R. 63-76.) The reference "cement plant" also includes certain machinery, equipment, structures, spare parts and supplies which at one time had been located at a certain quarry at Emory, California, but which, when the contract of sale was entered into, were located at the site of the main plant at Merced. (R. 23.)

Appellants contend that because a portion of the property purchased by Empresa had been shipped out of the county prior to tax day that all of the property purchased thereby acquired an exempt status. The trial court held in accordance with this contention but in so doing it made erroneous assumptions concerning the facts in *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469. The trial court viewed that case as authority for the decision which it rendered herein, that because part of the property, not included in the assessment, was moving on a foreign journey on tax day, all of it was exempt under the Import-Export Clause, even that which was still at the site in Merced County, some of which remained there for nearly another year.

The trial court in referring to the *Hughes Bros. Timber Co.* case said (R. 91-92):

> "* * * In that case pulp wood logs had been sold in Minnesota for transport to another state, the transportation to be made by floating the logs down a small river to its connection with another. In preparation for the delivery, the timber was logged and the logs taken down to the stream and placed, some of them on the ice and the balance on the bank, awaiting the breaking up of the ice. The ice broke April 2nd 'when the drive of the logs began, those on the ice moved by themselves and those on the bank were pushed in.' The decision does not state how long it took to 'push' in the logs. There were 10,000 cords of these logs and it is quite improbable that they had all been floated by May 1st, which is the day upon which they were attempted to be taxed. No question of

dividing the tax was raised; it seemed to be conceded that the movement of some of the logs was the beginning of the movement of them all * * *."

Thus the trial court assumed that in the *Hughes* case not all of the logs actually were moving on tax day, but that because some were moving, all were regarded for purposes of the commerce clause as moving. It appears from the record in that case, however, that such were not the facts, but that on the contrary all of the logs were moving down the stream on their interstate journey on tax day.

In the *Hughes* case the drive of the logs started in the Swamp River which flowed into the Pigeon River. Tax day in the *Hughes* case was May 1st. The trial court in that case found (Hughes R. 65):

"* * * That the floating of said timber commenced on the 29th day of April, 1922, and on the 1st day of May thereafter *all of said timber* was in said Pigeon River being floated down to Pigeon Bay * * *." (Emphasis added.)

The testimony upon which this finding in the *Hughes* case was based included the following testimony of an employee of the *Hughes Bros. Timber Co.* (Hughes R. 10):

"Q. Now, when in the year 1922 did the drive on the Swamp River commence?

A. The time for the drive in the Swamp River commenced on the 29th.

Q. The 29th day of——

A. Of April.

Q. Were you there?

A. I was there.

Q. And did you keep the time of the men?

A. I did.

Q. Was all the pulpwood that was piled on the banks put into the river on or by the 29th day of April?

A. Yes."

Thus the decision upon which great reliance was placed by the trial court has no application here since all of the property involved in the *Hughes* case was moving on its interstate journey on tax day.

We already have explained why it is not accurate to refer, as appellants do, to the property here involved as "an article, indivisible by its very nature, an entire, complete and operative cement plant". The physical facts are that the property was divisible and in fact was divided as of tax day, March 5, 1945. It is confusing for appellants to refer at page 43 of their opening brief to "an article", for the property here sold included many items, as we previously have indicated.

Appellants assert at pages 42 and 43 of their opening brief that a decision contrary to that for which they are contending would mean that tax liability would be determined on the basis of the amount of oil which had not yet gone through the pipes into tank cars being loaded. In making such argument we wonder if the appellants mean to urge that oil in place in the ground is to be exempt or if timber standing in the forest is to be exempt merely because

there is a contract pursuant to which the property is to be shipped to a foreign destination.

We think that appellants' assertion that the California Supreme Court has not cited any cases to support its decision cannot be sustained but that on the contrary the decisions cited by the California Supreme Court fully support the decision which it reached. Moreover, it should be observed that the appellants, although having the burden of establishing their right to a refund of tax, have not been able to cite any cases directly supporting their position.

V. MOVEMENT SUCH AS WAS INVOLVED IN THE DISMANTLING OF THE PROPERTY WAS PRELIMINARY OR PREPARATORY IN NATURE AND WAS NOT THE FINAL MOVEMENT OUT OF THE STATE LAUNCHING THE PROPERTY UPON ITS JOURNEY TO A FOREIGN DESTINATION.

Appellants contend at page 43 of their brief that exportation commences with the first movement of the goods toward the sea and that the dismantling, packaging and loading operations of Bigge was such a movement. Again it is necessary to point out that much of the property taxed had not been dismantled and none of it had been loaded. It is inaccurate, therefore, to infer, as appellants do at page 43, that any of the property taxed had been loaded on the railroad cars.

We submit that appellants' argument, that the machinery and equipment, the instant it was moved in the process of dismantling and packaging at the plant

site, thereupon was launched upon its journey to a foreign destination within the meaning of the prior decisions of this Court, is without merit.

Of course, as to approximately half of the property taxed, which still was standing in an undismantled condition, this argument would be unavailable because it had not even been moved around on the plant site. To say that such undismantled property was moving in export could be equivalent to saying that coal which had not been mined, or oil which still was in the ground, or timber which had not been cut, was moving in export. This Court already has emphatically expressed the contrary view. (*Cornell v. Coyne*, 192 U.S. 418, 427, *Coe v. Errol*, 116 U.S. 517, 527-528.)

As to that portion of the property taxed which had been dismantled by tax day, March 5, 1945, but most of which had not been packaged and none of which had been loaded on the railroad cars at the plant site, the decisions of this Court likewise plainly show that it was subject to taxation. Suppose grain is sold to a foreign purchaser. Does it become an export when it is being cut in the field? Does it become an export when it is being threshed? Does it become an export when it is being put in bags? The prior decisions of this Court demonstrate that the answer to these questions is no, that such movements of the grain as are involved in its cutting, threshing and packing are preparatory movements and not the final movement out of the state launching the goods upon their journey to a foreign destination.

In *Coe v. Errol*, 116 U.S. 517, cited by this Court in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 79, the logs had been cut down in New Hampshire and hauled to the Town of Errol in that State where they were, on tax-day, resting on the banks of a stream down which they were to be floated to the State of Maine. It was held that this was merely preparatory movement and not the final movement out of the state which would launch the logs upon their interstate journey.

In *Cornell v. Coyne*, 192 U.S. 418, the cheese had been manufactured and placed in packages at the time the revenue stamps were applied for. This Court did not regard the movement of the cheese while it was being manufactured and packaged as being part of the final movement out of the state but regarded it rather as being preparatory in nature. It said, p. 427:

> "... The exemption attaches to the export and not to the article before its exportation. ..."

By way of contrast, the baseball bats in *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66, had been loaded on the vessel of a common carrier, and in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, the oil had been loaded into the hold of a vessel owned by the purchaser.

Here, as we have seen, approximately half of the property taxed was standing in an undismantled condition on tax day, most of that which was dismantled had not been packaged, none of the property taxed

had been loaded on the cars of the railroad which were to carry it away from the plant site, all of the property taxed still was at the site where it was located when it was purchased, and much of it remained in the county for nearly another year. Under these circumstances, we submit that the Supreme Court of California correctly held that the property taxed did not enjoy constitutional immunity and that it should bear some of the costs of government.

VI. NO QUESTION OF VALUATION IS PRESENTED

Appellants make statements with respect to valuation which we believe do not require an extended answer. The short answer is that the question of valuation is not presented on this appeal. It was not raised in the protest which was filed when the tax was paid. No question of valuation was raised by appellants before the County Board of Supervisors, sitting as a Board of Equalization. Consequently appellants failed to exhaust their administrative remedies. Therefore, the question of valuation could not be made and was not made an issue in the trial Court. The question was not presented either by the pleadings or by the stipulation of facts. It is not, and could not be, included in the assignments of error.

VII. THE CASES RELIED UPON BY APPELLANTS DO NOT SUPPORT THE POSITION FOR WHICH APPELLANTS CONTEND.

Appellants assert that the instant case cannot be distinguished from *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66. We think there are a number of clear points of distinction. One feature which serves to completely distinguish the *Spalding* case is referred to by this Court at page 70 of the *Spalding* opinion, where it is said: "*The overt act of delivering the goods to the carrier marks the point of distinction between this case and Cornell v. Coyne*, 192 U. S. 418 * * *" (Emphasis added.) Here the stipulated facts show that none of the property taxed had been delivered to the carrier (The Atchison, Topeka & Santa Fe Railway Co.).

In the *Spalding* case this Court recognized the necessity of fixing a point at which, in view of the purpose of the Constitution, the export must be said to begin, and also recognized that there would be other points very near to it on the other side. We submit that the present case is on the other side. In the *Spalding* case this Court at page 69 observed that, for example, "while the goods were in process of manufacture they were none the less subject to taxation if they were intended for export, and made with specific reference to foreign wants * * *", citing *Cornell v. Coyne*, 192 U.S. 418 and *Heisler v. Thomas Colliery Co.*, 260 U.S. 245.

On the other hand, said this Court, no one would doubt that the goods were exempt after they had been loaded upon the vessel for Venezuela and a bill

of lading issued. In the *Spalding* case, at the time of impact of the tax, the goods had been loaded upon the vessel for Venezuela but the bill of lading had not been issued. It was with reference to this fact situation that this Court made the statement, quoted by appellants at page 51 of their opening brief, to the effect that: "* * * The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result. Getting the bill of lading stands no differently from putting the goods on board ship. * * *"

In the *Spalding* case, therefore, the goods had been loaded upon the vessel for Venezuela and were regarded as exports although the further act remained to be done of issuing a bill of lading. It certainly does not follow from this that where the acts to be done include the dismantling and packaging of property prior to loading it on a carrier, that such property is an export.

The case of *Clarke and Co. v. Clarke,* 3 Woods 408, cited by appellants, is not a decision of this Court but of a lower federal court. It was decided in 1877, nine years before this Court rendered its opinion in *Coe v. Errol,* 116 U.S. 517. The *Clarke* case was decided, therefore, without the benefit of the exposition of the applicable principle which later appeared in *Coe v. Errol.* Moreover, in the *Clarke* case, unlike the present case, the property had been moved from the place where it was located when it was purchased.

We take issue with the statement at page 44 of appellants' opening brief to the effect that the view of the California Supreme Court is directly contrary to the recent decision of this Court in *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69, 82. The quotation from that opinion appearing at page 44 of appellants' brief must be considered in the light of the facts of the *Richfield* case which show that the property there involved had been delivered into the hold of the ship, and this Court stated at pages 82 and 83 of the *Richfield* opinion that *the delivery of the oil into the hold of the vessel* marked the commencement of the exportation of the property. By way of contrast it will be recalled that here a substantial portion of the property had not even been dismantled on tax day and none of it had been moved from the site. As we previously have mentioned, the California Supreme Court applied the test laid down by this Court in the *Richfield* case in which this Court endorsed the language set forth in its earlier opinion in *Coe v. Errol*.

Appellants' reliance upon the *Richfield* case as authority for their position here amounts to an effort to make that case do the work of a decision holding that the sale of oil in place in the ground *ipso facto* converts that oil into an export, before it has been removed and, of course, before it has been loaded on a vessel. It is evident that such contention goes far beyond the decision of this Court in the *Richfield Oil* case.

With reference to the cases of *United States v. Hvoslef*, 237 U.S. 1, *Fairbanks v. United States*, 181 U.S. 283, *Thames & Mersey Insurance Company v. United States*, 237 U.S. 19 and *N. Y. and Cuba Mail S. S. Co. v. United States*, 125 F. 320, cited at page 39 of appellants' opening brief and the quotation from *Willcuts v. Bunn*, 282 U.S. 216, 228, it should be noted that no tax on the process of exportation or on the transactions and documents embraced in that process is here involved. The tax is on property and the only question is whether the property assessed had become an export by tax day, March 5, 1945.

Appellants at page 40 of their opening brief cite the case of *Puget Sound Stevedoring Company v. Tax Commission*, 302 U.S. 90, 92, 94. We think it is readily apparent that this case has no application here. None of the property taxed had been loaded, nor is this a tax on the process of loading.

Appellants cite cases at pages 56 and 57 of their opening brief, *Carson Petroleum Company v. Vial*, 279 U.S. 95, 105-106, *Railroad Commission v. Worthington*, 225 U.S. 101, 108-111, and *Western Oil Refining Company v. Lipscomb*, 244 U.S. 346, 349-350, relating to continuity of a journey which has been commenced. We are not here concerned with the problem of whether there has been an interruption of the continuity of a journey once commenced, but whether the journey to a foreign destination has begun. Appellants cite *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469, 475, at pages 59 and 60 of their opening brief.

As we have previously pointed out, all of the logs in that case were moving down stream on tax day. The cases of *State of Texas v. Anderson, Clayton & Co.*, 92 F. (2d) 104, 107, and *Multnomah County v. Dant and Russell, Inc.*, 158 Ore. 350, 354, 75 P. (2d) 986, cited at page 60 of appellants' opening brief, relate to situations in which the final movement out of the state had commenced.

In *Dahnke Walker Milling Co. v. Bondurant*, 257 U.S. 282, 290, from which quotation is made at page 61 of appellants' opening brief, this Court was concerned with a problem of regulation, not taxation. Moreover, it is well established by decisions which we have cited that the mere purchase of property is not sufficient in and of itself to make the property an export within the meaning of the Import-Export Clause.

CONCLUSION.

None of the property assessed, by tax day, March 5, 1945, had been shipped, or entered with a common carrier for transportation to a foreign destination, or started upon such transportation in a continuous route or journey. Consequently it had not ceased to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way.

We respectfully submit that the decision of the Supreme Court of California is correct and should be affirmed.

Dated, San Francisco, California,
February 1, 1949.

Respectfully submitted,

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